

Nos. 2209, 2210, and 2211..

In the United States Circuit Court of
Appeals for the Ninth Circuit.

No. 2209.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLAR-
ENCE W. ROBNETT, WILLIAM DWYER, AND FRANK
W. KETTENBACH, APPELLEES.

No. 2210.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLAR-
ENCE W. ROBNETT, WILLIAM DWYER, THE IDAHO
TRUST COMPANY, A CORPORATION; THE LEWISTON
NATIONAL BANK, A CORPORATION; THE CLEAR-
WATER TIMBER COMPANY, A CORPORATION; ELIZA-
BETH W. THATCHER, CURTIS THATCHER, ELIZABETH
WHITE, EDNA P. KESTER, ELIZABETH KETTEN-
BACH, MARTHA E. HALLETT, AND KITTY E. DWYER,
APPELLEES.

No. 2211.

THE UNITED STATES OF AMERICA, APPELLANT.
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, AND
WILLIAM DWYER, APPELLEES.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.*

BRIEF ON BEHALF OF APPELLANT.

FILED

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THE UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, Clarence W. Robnett, William Dwyer,
and Frank W. Kettenbach, appellees. } No. 2209.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, Clarence W. Robnett, William Dwyer,
The Idaho Trust Company, a corporation,
The Lewiston National Bank, a corporation,
The Clearwater Timber Company, a corporation,
Elizabeth W. Thatcher, Curtis Thatcher, Elizabeth White, Edna P. Kester, Elizabeth Kettenbach, Martha E. Hallett, and Kitty E. Dwyer, appellees. } No. 2210.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, and William Dwyer, appellees. } No. 2211.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASES.

Between April, 1902, and April, 1909, about 9,000 acres of Government timber lands in Latah and Nez Perce Counties, Idaho, were entered under the timber and stone act of June 3, 1878 (20 Stat., 89), as amended by the act of Congress of August 4, 1892, and transferred by the entrymen, practically as fast as their entries were perfected, to one or more of the defendants, except such entries as are still held by the entrymen in trust for one or more of the defendants.

Each of the three above-entitled suits was brought by the United States against William F. Kettenbach, George H. Kester, William Dwyer, and other parties to cancel the patents to said lands on the ground that the titles thereto were obtained from the Government by said defendants in violation of the governmental policy with respect to the public lands, and contrary to the letter as well as the spirit of the timber and stone act.

In case No. 2209 sixteen different patents are attacked; in case No. 2210 thirty-eight, and in case No. 2211 eight are attacked.

The bills of complaint as amended charge that Kester, Kettenbach, Dwyer, and others about the years 1901 and 1902 entered into a conspiracy by which they were, by indirection, to acquire public timber lands in excess of the maximum amount allowed by law to any one person, and that from time to time, in effecting the purpose of such conspiracy, they joined to themselves other persons (Clarence W. Robnett, Jackson O'Keefe,

Fred Emory, C. W. Colby, and Harvey J. Steffey), and, either directly or through the persons so associated with them, entered into unlawful agreements with numerous qualified entrymen by which such persons should, ostensibly for their own use and benefit, but in reality for the use and benefit of the defendants, acquire title with the understanding that immediately or soon after the acquisition thereof they should, for a small consideration, convey it to the defendants or one of them; also that the persons procured by said defendants, their coconspirators or agents, as a part of his application to enter and as a necessary and material step in the proceedings to obtain a patent for the land sought by him to be entered, did file in the Land Office a written statement of the tenor prescribed by said act of Congress wherein such persons did falsely, fraudulently, and deceitfully swear in substance that he or she was not applying to purchase the tract of land by him or her sought to be entered *on speculation*, but in good faith to appropriate the same to his or her own exclusive use and benefit, and that he or she had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he or she should acquire from the Government of the United States should inure in whole or in part to the benefit of any persons except him or herself, whereas in truth and in fact each of said persons was applying to enter the tract by him or her sought to be entered *on speculation*, and not in good faith for his or her own exclusive use and benefit, and had made an unlawful agreement with the said defendants whereby the title by him or her to be acquired should inure

to the use and benefit of the said defendants, to some other person or to some firm to be by said defendants designated; *and that said statements so made by the said persons, and each of them, were known by said persons and by each of them, and were known by said defendants to be false, untrue, fraudulent, and deceitful.* (Par. 14, bills of comp., Nos. 2210-2211; par. 11, bill of comp., No. 2209.)

By stipulation of all the parties to the several cases there was a consolidation in the District Court for the purpose of taking the testimony in said cases, and said cases have been consolidated by order of this court.

The district judge, in an opinion common to the three cases, held that all of the land involved in case No. 2211 was entered by the several entrymen in fraud of the statute, but that Kester and Kettenbach held the same as innocent purchasers; that a large portion of the land involved in cases No. 2209 and No. 2210 was lawfully entered, but that a number of the entries in said cases were fraudulently made. As to the latter, he held that the defendants in whom the titles thereto were vested were innocent purchasers thereof, except as to the entries of Guy L. Wilson, Frances A. Justice, and Robert O. Waldman, and these he ordered canceled.

On April 15, 1912 (pp. ———), decrees were entered dismissing the bills of complaint in cases No. 2209 and No. 2211, and canceling the patents for the entries made by the said Wilson, Justice, and Waldman in No. 2210, and dismissing the bill as to the other entries therein. It is from these decrees that appeals are taken to this court.

THE EVIDENCE.

INTRODUCTORY STATEMENT.

The District Court reached the conclusion it did by holding in effect that the witnesses Clarence W. Robnett and Harvey J. Steffey are not worthy of belief under any circumstances and in giving no weight whatever to their testimony no matter how strongly it was corroborated by contemporaneous circumstances, and in giving such weight and credibility to the testimony of Kettenbach, Kester, Dwyer, and other witnesses as though it came from entirely disinterested persons and persons of the strictest integrity and unimpeachable character. It would seem to us, therefore, not inappropriate at the outset to present to the court the more important witnesses in their true light.

At the beginning of the opinion the court announced the law on the question of the weight to be given the testimony of an accomplice and then stated that the fact that Robnett is an accomplice is not the most serious consideration affecting his credibility, as it appears from credible evidence, independent of his admissions to the same effect, that in several instances he deliberately induced entrymen to make false statements, both in their application and in their testimony upon final proof relative to entries involved in the cases, which false statements, although in some cases not constituting technical perjury, involve on the part of Robnett all the moral obliquity of perjured statements, because they were made under oath, at a time when it was assumed that such oath was authorized by law. Subsequently he was indicted and convicted of subor-

nation of perjury, in inducing entrymen in their preliminary applications in the Land Office, falsely to represent under oath, that they had personally visited the lands applied for prior to initiating their entry. The court further said that said judgment was reversed by this court for the reason that that part of the sworn statement was not authorized by statute, and therefore could not be the basis of a charge of perjury or subornation of perjury, even though the statement made was wilfully false (259-260).

The only "creditable evidence independent of his admissions" that he induced entrymen to make false statements in their application and final proof, *is that of the entrymen who made and swore falsely to such statements*, and it would seem that the same moral obliquity that attached to Robnett would also attach to them.

But as to the entrymen who swore falsely in the papers they filed in the Land Office as a part of their entry, the court said:

The immorality of such perversion of the truth is, of course, much to be deplored * * *. Under the circumstances of the case, in view of the prevalent understanding that the officers of the Land Department would not accept borrowed money, *there is no room for the inference that because the entryman perverted the truth in this particular he also falsified the facts in some other particular*" (p. 273).

The defendant Dwyer was also convicted of subornation of perjury in the same court as was Robnett and at about the same time. He induced Hiram F. Lewis

and Guy L. Wilson, witnesses in these cases, to swear falsely in their sworn statement; and said two persons and Charles Carey to swear falsely at final proof, and the judgment in that case was reversed by this court. (*Dwyer v. United States*, 170 Fed., 160, case No. 1606.)

Sentences were awarded to Robnett and Dwyer on said convictions by the district judge who wrote this opinion.

Again, in the opinion of the district court appears the following:

In the second place, after Robnett's conviction, and prior to the reversal referred to, the three principal defendants were put on trial upon the charge of conspiring to defraud the United States out of the title and possession of some of the timber lands described in the bills of complaint. At such trials Robnett was called to testify upon behalf of the defendants, and, while so testifying, under oath, in open court, he made many statements of fact which are directly contrary to, and wholly irreconcilable with, the testimony which he gave before the examiner in these cases. And again not a great while before giving his testimony before the examiner, he made affidavit to statements wholly irreconcilable with statements he made under oath. Under such circumstances, it is insisted by the defendants that it can not properly be held that the witness recognizes the sanction of an oath or has any regard therefor; and there is suggested the further question, to which testimony the greater weight should be accorded, that given at the criminal trial, favorable to the defendants, or that given in the present suits, favorable to the Government.

It is a fact that at the trial of Robnett, in November, 1906, at which he was convicted of subornation of perjury and his personal liberty was at stake, he did not take the witness stand in his own defense. (See record No. 1607, this court, *Robnett v. United States*, 169 Fed., 778.) And at the trial of the case against Kettenbach, Kester, and Dwyer, mentioned in the opinion at which Robnett testified for the defense, he was not a party defendant and his personal liberty was not at stake, he was influenced, however, to swear falsely to save Kettenbach, Kester, and Dwyer from prison.

At the trial of said case the defendants were found guilty, and the district judge who wrote the opinion in the present cases presided at the trial and imposed sentences upon the defendants. Besides Robnett, each of the defendants, Kester, Kettenbach, and Dwyer, testified in his own defense and each denied all of the evidence pointing to his guilt, thereby contradicting a great many witnesses, most of whom were entrymen and testified in the present equity proceedings. The district judge refused to hear motions for a new trial on technical grounds, but he must have been impressed with the fact that the defendants perjured themselves in giving testimony at said trial and were guilty of the offenses of which they were convicted or he would have set aside the verdict of his own motion. The judgment of the trial court was reversed by this court May 17, 1909, one of the grounds being the refusal of the trial court to hear the motions for new trial. (No. 1605, *Kester, Kettenbach, and Dwyer v. United States*, 170 Fed. 167.)

The affidavit mentioned by the court in the opinion was made by Robnett relative to the entry of Carrie D. Maris, July 1, 1909, three years after Robnett had conveyed said claim to Kester and Kettenbach in July, 1906. Therefore, Robnett was induced to make said affidavit for the defendants, and they at the time of obtaining the same having no other use for or purpose than of using it to impeach Robnett in the event he should testify to the real facts concerning the Maris entry at the retrial of the case just mentioned. It is now evident that Robnett testified truthfully in the present cases relative to the procuring of the Maris entry. The entrywoman testified to an agreement entered into between Robnett and herself before the entry was initiated, in violation of law, and the court held that the entry was made in fraud of the statute (pp. 305-306). The record shows, as we will point out hereafter, many instances where the defendants, many months after they had secured title to entries, obtained affidavits from the entrymen for similar purposes.

Again, in the opinion, the court said:

It seems that while indictments were still pending against him (Robnett) charging him with offenses connected with his land transactions, and while he was employed as bookkeeper in the Lewiston National Bank he violated the national bank laws in a number of particulars, one of such violations being the abstraction and embezzlement of divers sums of money aggregating an amount alleged to be greatly in excess of \$100,000. He was arrested on a charge of one or more of such violations and held to appear

before the grand jury. After such arrest, and prior to the convening of the grand jury, negotiations were entered into between him and the special agents of the Government, at the instance of the latter, as a result of which he appeared to have concluded to testify as a witness for the Government not only in these suits, but in the criminal cases pending against the principal defendants and others, and also before the grand jury in relation to the affairs of the Lewiston National Bank which were to be made the subject of investigation (pp. 262-263).

* * * While in the trial of the three principal defendants (Kester, Kettenbach, and Dwyer) upon the charge of conspiracy to defraud the United States in connection with the entry and acquisition of title to the timber lands herein involved (the case upon which the defendants had been convicted and that judgment reversed and a new trial ordered by this court), he testified upon behalf of the Government, his testimony being in many respects the same as that given before the examiner, and later he testified at three different trials involving charges against the defendant Kester, and the defendants W. F. Kettenbach and F. W. Kettenbach relating to the affairs of the Lewiston National Bank. In the meantime, before the trial of any of the national bank cases, the criminal charges against him growing out of his timber transactions were dismissed upon the motion of the Government (pp. 263-264).

The court thus proceeds on the theory that Robnett gave testimony in the present cases and in the national bank cases mentioned in order to protect himself, the implication being that, notwithstanding there was no

direct promise of immunity, Robnett believed that a certain amount of consideration would be shown him by the Government by reason of his testimony, and that the President had rewarded him therefor by granting him an unconditional pardon. Thus the opinion proceeds:

He (Robnett) states that no definite promise of immunity was ever made to him and possibly that he was informed by the special agents that they did not have the authority to make such agreement. With some apparent reluctance he admits that he decided to take the course which he was asked to take, and which, after some consideration, he concluded to take with the hope that in some way he would profit thereby. * * * (P. 263.)

In the absence of substantial evidence, and especially in view of the disclaimer of knowledge of any such agreement (promise of immunity in the land fraud and bank cases) upon the part of the responsible representatives of the Government, I should be loath to believe that any agreement was entered into. * * * (P. 264.)

It is wholly unimportant whether or not he had any agreement for immunity, if, as he admits to be the case, he pursued the course which he did pursue and testified for the Government with the hope of receiving favorable consideration. * * *

It is quite incredible that he did not learn from some source that the prosecution, as a rule, is not ungrateful for information furnished by persons charged with crime, and his hope that he might profit by such consideration proves not to have been entirely unfounded, for, subsequent

to his admission in the several cases, it is a matter of record in this court and common knowledge that upon his pleading guilty to each of six different counts, charging violation of the national banking laws by making false entries and false reports, and five counts, charging embezzlement or abstraction of the funds belonging to the bank, aggregating approximately \$137,000, he was promptly granted an absolute pardon (p. 265).

To the statement in the opinion that before the trial of the bank cases the indictments against Robnett growing out of his timber transactions were dismissed upon the motion of the Government, the court might have added, as it is a fact, that, at the time of the dismissal of the indictments against Robnett or shortly thereafter and before the trial of the present cases, all the indictments against the defendants, Kester, Kettenbach, and Dwyer and other persons, growing out of the land transactions in the northern division of the District of Idaho, whether they had been witnesses for or against the Government, were also dismissed. The cases referred to are:

United States v. Clarence W. Robnett. No. 601.
Filed July 13, 1905.

Charge: Subornation of perjury. Based on securing Joel H. Benton, uncle of Kettenbach, to swear falsely in connection with his entry, which is involved in the present cases.

United States v. Clarence W. Robnett. No. 621.
Filed November 6, 1905.

Charge: Subornation of perjury. Based on procuring Louis Drackman to swear falsely in connection with his timberland entry.

United States v. William B. Benton. No. 620.
Filed November 6, 1905.

Charge: Subornation of perjury. Based on procuring John H. Long to swear falsely in connection with his entry of timberland. Both Benton and Long are entymen in the cases herein, and Benton is a cousin of Kettenbach.

United States v. Joel H. Benton. No. 602.
Filed July 13, 1905.

Charge: Perjury. Swearing falsely in making entry of his timber claim.

United States v. F. L. Shaefer. No. 603.
Filed July 13, 1905.

Charge: Perjury. Swearing falsely in making entry of a timber claim.

United States v. Rowland A. Lambdin. No. 604. Filed July 13, 1905.

Charge: Perjury. Swearing falsely in making entry of a timber claim.

United States v. George H. Kester. No. 606.
Filed July 13, 1905.

Charge: Subornation of perjury. Suborning Ivan R. Cornell to commit perjury in connection with his timberland entry.

United States v. William B. Benton, Clarence W. Robnett, and William F. Kettenbach. No. 617. Filed November 6, 1905.

Charge: Conspiracy to defraud the United States of its timberlands.

United States v. William F. Kettenbach, George H. Kester, and William Dwyer. No. 615. Filed November 6, 1905.

Charge: Conspiracy to defraud the Government of the timberlands involved in the present suits and known as the Steffey group.

United States v. Fred Emory, C. W. Colby, George H. Kester, and William F. Kettenbach. No. 618. Filed November 6, 1905.

Charge: Conspiracy to defraud the United States of its timberlands, among them are entries involved in the present cases. (This indictment had previously been dismissed as to Kester and Kettenbach.)

United States v. William Dwyer. No. 616. Filed November 6, 1905.

Charge: Subornation of perjury, in suborning Hiram F. Lewis and Guy L. Wilson to commit perjury in connection with timberland entries they were making. The latter's entry was involved in these cases and was held for cancellation by the District Court.

Notwithstanding Rowland A. Lambdin refused to testify on behalf of the Government at the trial of the defendants, though he had given evidence against them at the former trial of the same case, the indictment against him above mentioned was also dismissed. His refusal to testify on behalf of the Government in the present cases on the ground that his testimony might tend to incriminate him was after said indictment had been dismissed.

William B. Benton, Fred Emory, and C. W. Colby all testified on behalf of the defendants in the present cases, and Benton testified for the defendants at a former trial and before the indictment against him was dismissed.

In every indictment mentioned in the opinion charging Robnett with abstraction or embezzlement of funds of the Lewiston National Bank or other violations of

the national banking laws, the defendants Kester and Kettenbach were codefendants with him, either as principals or as aiders and abettors, with the exception of one in which Robnett was jointly indicted with the defendant Frank W. Kettenbach.

Some months before the trial of the present cases and before the delivery of the opinion herein, the defendants Kester and Kettenbach were tried and found guilty of violations of the national bank act in the same court in which the present cases were tried, but before a different judge. The judgment in that case was affirmed recently by this court; and the record of that case shows clearly that Kester and Kettenbach not only swore falsely in defense of themselves at the trial of said case, but that they directed and caused Robnett to make false entries in the reports to the comptroller to conceal their unlawful use of the funds of the bank, much of which was used in the timber transactions involved in the present cases.

Instances of Presidents and of governors of the several States extending executive clemency to persons having pleaded guilty to or having been convicted of crime, either before or after testifying at the trial of their coconspirators or codefendants in crime, are not uncommon. It is, however, exceedingly rare, if not entirely without precedent, for a Federal judge, in order to fortify himself in a conclusion reached, to hold in effect and by innuendo charge, though reluctantly disclaiming any such purpose, that such persons testifying under such circumstances did so because of an implied agreement or understanding with the prosecuting officer that immunity would be granted and that the

executive had immediately thereafter made good the implied agreement by granting an unconditional pardon. A striking illustration, though far more serious in its character than in the present case, occurred at the trial of the persons charged with the murder of former Governor Steunenberg. At the trial of that case the senior Senator from Idaho and the retiring governor of that State represented the prosecution. One of the codefendants, Orchard, pleaded guilty and at the trial gave evidence on behalf of the State, and in the course thereof admitted his complicity in thirty-odd murders, and sentence of capital punishment was imposed upon him. Later that sentence was commuted by the governor, now junior Senator from the State of Idaho. We do not believe, nor have we ever heard it charged except perhaps by those in sympathy with the defendants in that case, that the eminent gentlemen who conducted that prosecution promised immunity to Orchard for his testimony, or that the distinguished gentleman who granted the clemency was carrying into effect an implied agreement.

As to the witness Harvey J. Steffey, the court said:

Not only was he an accomplice in the conspiracy, but in effecting the object thereof he suborned perjury, for he knowingly induced the entrymen to commit perjury in their preliminary applications; and it is further to be noted that while acting as a witness at the final proof in several cases he made answers under oath which he knew to be untrue, and which, while possibly not constituting technical perjury, involved the moral obliquity of perjury (p. 353).

Then the court, after quoting portions of Steffey's testimony, said:

Obviously testimony so tainted can not properly be accorded the weight and force of evidence from an undefiled source (p. 356).

The court held that the eight entries procured by Steffey and involved in case No. 2211 were made in fraud of the statute. It was unwilling to hold, however, that Kester, Kettenbach, and Dwyer were acting in concert with Steffey, or that they had any knowledge of the fraudulent character of said entries. This conclusion was based largely upon testimony of Kester, Kettenbach, and Dwyer whereby they denied all complicity in the making of the entries or knowledge of the manner in which they were made.

As further reason for holding that Kester and Kettenbach were innocent purchasers for value of the entries forming the Steffey group, the court said:

Upon the one hand, it is undoubtedly true - that the defendants were acquiring timber lands, and were lending encouragement and assistance to qualified entrymen with the hope at least that they would be able to purchase the title after it passed from the Government into private ownership. * * * On the other hand, the record shows that in July, 1905, a considerable time before any one of these entries was initiated, and again in November, 1905, about the time the first entry was made (meaning the Steffey group), the defendants were indicted on charges of conspiring to defraud the United States out of its timber lands and of subornation of perjury in relation to the acquisition of title to certain timber lands. If not otherwise, the technical

requirements of the statute must have thus been forcibly brought to their attention, and they must have become conscious of the peril of participating in fraudulent acquisition of timber lands and of the risk of purchasing titles so acquired. In the absence of some powerful motive or some strong incentive it would seem to be almost incredible that men of *business and social standing* (Kester and Kettenbach) in the community would, after indictment charging certain conduct to be criminal, and after being advised that the Government was engaged in an investigation of their transactions relating to the acquisition of timber lands, lend themselves or continue to participate in a scheme violative of the very laws on which the pending indictments were based (pp. 363-364).

The undefiled character and business and social standing of Kester and Kettenbach in the community seems not to have restrained them during the period of the investigation of their land transactions and the finding of the indictments mentioned by the court, and also before and subsequent to the return of said indictments, from using large sums of the funds of the Lewiston National Bank in these very transactions and in making false entries in the reports to the comptroller in order to conceal their wrongdoing, although the penalty for violating the national banking laws is much more severe than is the punishment for violating the timberlands law; and the testimony of Steffey and the contemporaneous circumstances surrounding the making of the Steffey group of entries and the acquisition of title thereto by Kester and

Kettenbach shows conclusively that the defendants did not acquire said claims as innocent purchasers.

The court further said:

While the evidence was taken and reported by a special examiner, many of the transactions involved have been the subject of investigation in this court at different times during the last five years in connection with the criminal prosecution of the defendants, and certain of the witnesses appearing before the examiner have testified upon the same subject one or more times in the criminal trials, so that there has been some opportunity for observing *their manner of testifying and of forming some estimation of their dispositions and intelligence* (p. 258).

Notwithstanding the court's opportunity of observation as announced, it is apparent that if it observed it failed to note on a number of occasions the manner and disposition of Kester, Kettenbach, and Dwyer, and other witnesses for the defense while giving testimony, which would affect seriously the credibility and weight to be given their testimony. Furthermore, the record in the present cases shows, as we shall point out hereafter, that Kester and Dwyer time and time again suborned entrymen to perjure themselves in making their entries at the Land Office, and that Dwyer and Emory on a number of occasions, while witnesses at final proof for entrymen, gave evidence under oath which they knew to be untrue, and were guilty of "the moral obliquity of perjury." There is nothing in the opinion, however, to indicate that the testimony of the defendants and of the wit-

nesses on behalf of the defense came from other than an undefiled source.

We make no attempt to excuse Robnett. We suggest the following, however, in mitigation of his conduct. As a boy of humble origin he entered the Lewiston National Bank in the menial position of janitor and remained with that institution for seventeen years. Kester and Kettenbach were president and cashier, respectively, of said bank from 1895 until they retired in July, 1907, and during that period Robnett was the bookkeeper and did their bidding in all matters, so what he learned was while he was enjoying the social and financial surroundings of the Lewiston National Bank and under the tutelage of the defendants, Kester and Kettenbach. He engaged with them in their timber enterprises, in which they all used the funds of the bank. In order that their wrongdoing might not be discovered, he made false entries in the books of the bank and in the reports to the comptroller by their direction. Though he did not testify in his own defense, when tried for subornation of perjury, he testified falsely in defense of Kester, Kettenbach, and Dwyer in order that they might escape conviction upon the charge of conspiracy to defraud the Government of some of the lands in the present cases. After his arrest upon a warrant charging him with violating the National Banking Laws, sworn out by the defendant, Frank W. Kettenbach, he realized that it was intended that he and Chapman (assistant cashier) should alone be held responsible for the violations of law in connection with the conduct of the business of the bank. He decided to tell the

officers of the Government all that he knew of all the transactions in which he and the other defendants in these cases were engaged. At that time he had transferred all of his property to Frank W. Kettenbach, and was penniless.

All that we ask is that Robnett and his testimony and Steffey and his testimony be measured by the same legal and moral standards as are the defendants and other witnesses and their testimony in these cases.

We shall not ask that Robnett's and Steffey's evidence be given weight except when such evidence is corroborated, and any statement made in this brief based upon the testimony of either Robnett or Steffey will be so indicated.

PARTIES DEFENDANT.

The defendant William F. Kettenbach has resided at Lewiston for the last 32 years. He entered the Lewiston National Bank in 1893, and was successively remittance clerk, bookkeeper, assistant cashier, until in 1895, when he was elected president, and remained as the head of that institution until he was succeeded by his uncle, Frank W. Kettenbach, July 8, 1907 (pp. 3430, 3846).

George H. Kester was employed in various capacities in the Lewiston National Bank from 1890 to 1907, and was cashier from 1895 until he resigned in July, 1907 (p. 3141).

The defendant Clarence W. Robnett was continuously employed in the Lewiston National Bank from December, 1892, until March, 1909, with the exception of the months of August and September, 1907. He

entered the bank at the age of 17. The first two years of this period his duties were those of janitor, at \$35.00 per month, and during the last ten years of his service he was a bookkeeper. When he first entered the bank, Frank W. Kettenbach was cashier and George H. Kester was assistant cashier (pp. 2202, 2203, 2204).

The defendant Frank W. Kettenbach, uncle of William F. Kettenbach, began work in the Lewiston National Bank as bookkeeper in 1885, worked in different positions in the bank and finally became its president, resigning about January, 1896 (p. 3577). He was again elected president of the Lewiston National Bank in July, 1907, and served in that capacity until about January, 1910 (p. 3545). He is also the president of the Idaho Trust Company and has held that position ever since the Idaho Trust Company was organized in July, 1902 (p. 3545).

The defendant William Dwyer resides at Lewiston, Idaho. He is a timber cruiser and has been engaged in that business in Michigan, Wisconsin, Minnesota, and Idaho since 1887. He has been acquainted with the defendants William F. Kettenbach and George H. Kester for about thirteen years (pp. 3298, 3299, 3303). The first cruising he did for either Kester or Kettenbach was in 1902 (p. 3366).

The defendant the Lewiston National Bank, of Lewiston, Idaho, was incorporated under the laws of the United States relating to national banks in 1883, with a capital stock of \$50,000.00. The articles of incorporation were renewed in May, 1903, for a period of twenty years. In January, 1905, its capital stock was increased to \$100,000.00 (pp. 1958, 1960).

The defendant the Idaho Trust Company, with its office at Lewiston, Idaho, was incorporated under the laws of Idaho in July, 1902. Frank W. Kettenbach, one of its incorporators, has been its president ever since it came into existence (p. 1890).

The defendant Elizabeth Kettenbach is an aunt of William F. Kettenbach (p. 1557).

The defendant Elizabeth White is the mother-in-law of William F. Kettenbach (p. 744).

The defendant Edna P. Kester is the wife of George H. Kester (p. 736).

The defendant Kittie E. Dwyer is the wife of William Dwyer (p. 1877).

The defendant Martha E. Hallett was a particular friend of George H. Kester, who was boarding with her at the time she made her timber and stone entry (p. 1593).

THE CONSPIRACY.

Robnett testified that in the spring of 1902 Kester and William F. Kettenbach became interested in the acquisition of timberlands and the matter was often discussed between them and others at the Lewiston National Bank. Because of Dwyer's knowledge of timber and his experience in that business in Minnesota, and the fact that he had already cruised a number of timber claims and had people he said he could put on them, Kester and Kettenbach, in March of that year, decided that if Dwyer were willing they would enter into a partnership with him and he would do the cruising in the woods. The three were to share equally in the profits of the undertaking (pp. 2204, 2205, 2206).

Shortly thereafter a partnership was formed between Kester, William F. Kettenbach, and Dwyer and they procured different persons to enter all the timber claims that they had at that time cruised, upon an agreement that said entrymen would convey the title they would acquire from the Government to Kester, Kettenbach, and Dwyer for \$100 or \$200 apiece, the agreement being that Kester and William F. Kettenbach would furnish all of the money incident to the making and the perfecting of said entries (p. 2208).

About the same time an agreement was entered into between William F. Kettenbach, Kester, and Robnett to the effect that at any time Kester and Kettenbach had timber claims cruised for which they did not have entrymen they could put on said claims, that they would pay \$100 or \$200 to each person Robnett would induce to make an entry upon one of such timber claims upon an agreement that said entrymen would convey the same to them after final proof (pp. 2207, 2208). As to other timber claims upon which Robnett would induce persons to make entry on his own account, it was agreed that Kester and Kettenbach would furnish him all the money that he needed for that purpose, but that they were to have the preference right over anybody else to purchase the same. In either event, Kester said, "We will treat you right in it," and "We don't take anybody up to the timber except the ones we have an understanding with that after the proof that they deed the claim over for whatever we agree with them" (pp. 2209-2210).

Robnett's testimony in the matter is as follows:

Q. Well, now state what was said [referring to conversation Robnett had with Kettenbach after relating the conversation he had overheard between Kester and Kettenbach relative to their entering in the scheme to obtain the Government's timberlands].

A. I went into the office there, Will Kettenbach's private office, and——

Q. Was that in the bank?

A. In the bank, in the President's private office, and I says, "Will, I overheard a conversation between you and George the other day, and if there is any money to be made out of the timber I would like to get in and work with you and make some money." and Will says, "Clarence, we would like to help you, but we are going into arrangements with Dwyer and George and myself," and he says, "We are to be equal partners, and I don't see any chance for you to get in, but you can have a talk with George, and we will do all we can for you."

Q. At that time or prior to that time had you heard any conversation between Mr. Kester and Mr. Kettenbach, or any plan outlined by them as to how they were to get this land?

A. Why——

(Objection.)

A. Yes; the plan that they talked over at different times there was relative to getting entrymen to file on the claims and pay them so much for their rights, and the matter was brought up at the time I had a talk with Mr. Kester, what each one was to do.

Q. Well, now, what was said at that time?

A. Well, I met George in the bank, and I said, "George, I have had a talk with Will, and he

told me to come and see you," and I told him I had overheard their conversation and heard them talking in regards to going into the timber with Bill Dwyer, and locating people on claims, and I says, "Now, if there is any way I can get into it, I am going to get in and make some money out of the timber, too," and George says, "I will be only too glad to help you out, and I want to see you make some money, but all the claims we know of at the present time that have been cruised, we have people to put on them; but if at any time we have got any timber, any claims, and you have got any entrymen or can get anybody that will locate and sell their claims to us for one or two hundred dollars we are willing to pay that. We want to know, though; we don't want to handle anyone but what we know will turn their claims over after the proof is made."

Q. Now had there—before this talk that you had had that you have detailed with Mr. Kettenbach and the one you have recited as having had with Mr. Kester, had you heard them speak of the conditions on which they would locate people on these claims?

A. Yes.

Q. Well, now, when was that?

A. That was during one of those conversations in which they discussed it there; I don't know whether it came up in that conversation which I referred to when I saw Mr. Kettenbach or the one before. It was along the line of paying the entrymen from \$100 to \$200 for their right.

Q. And what was the entryman to do?

(Objection.)

A. The entryman was to go into the timber with Mr. Dwyer and see the claim, come back and file, prove up, and deed the claim over to whoever Kester and Kettenbach designated. They were to furnish all the expenses.

Q. Now, did you know of any one particular locality in which they were to operate?

A. At that time it was around the Potlatch and the Pierce City district.

Q. That was in Idaho?

A. Yes.

Q. Now, I will ask you whether or not these entrymen that you have referred to as having heard talked about, what were they to sell to make this \$150 to \$200?

(Objection.)

A. The timber claims they was to prove up on, to be located on by Bill Dwyer.

Q. I will withdraw the question and ask you what the conversation was relative to that point, that you have detailed as hearing between Mr. Kester and Mr. Kettenbach?

A. Well, the entryman was to file on a claim, and for his right he was to receive \$100 to \$200 when he deeded his claim over after proof.

Q. Now, when you saw Mr. Kester, what did he say to you when you spoke with him about conversation you had had with Mr. Kettenbach?

A. He said, "Clarence, we don't see how you can get in with us at the present time, though, on account of the timber we have cruised, that we know about, that we have entrymen for at the present time, we have entrymen for that that will sell their right for one to two hundred dollars; but if you can furnish us any more at any time when we haven't any entrymen, we

will treat you right in it, as long as you don't interfere with anything we have under headway or any of the claims we want. If you want to locate anybody and go into it on your own hook, it is perfectly satisfactory to us, and we will see that you get all the money that you need; but any time that you have any claims in your control that we want, why, we want to have the preference right over anybody else."

Q. Now, was anything further said at that time as to the arrangements they had with the people?

A. He says, "We don't take anybody up to the timber except the ones we have an understanding with that after proof that they deed the claim over for whatever we agree to give them." It would range from \$100 to \$200, according to the entryman (pp. 2206-2210).

* * * * *

Q. Did you take any care, Mr. Robnett, of the character of people that you would locate on these claims?

A. Yes; I never located anybody but what I had the handling of their claims—that is, would have the right to sell the claim.

Q. Did you locate anybody on any claim who wouldn't make an agreement with you before they entered it to convey it to whom you would direct?

A. No (pp. 2325-2326).

Robnett also testified that before he had any claims cruised and before he located any persons on any claims he always talked the matter over with Kester and Kettenbach, so that there would be no conflict between them as to the claims to be located or the persons to be

located upon them. Pursuant to this arrangement Robnett induced fifteen or sixteen persons to locate on claims, and the claims were later conveyed to Kettenbach, or as Kester or Kettenbach directed. The estimates of these claims were submitted to Kester and Kettenbach before the entrymen were located thereon, and they told him to "go right ahead." Some of the entries that Robnett caused to be made he tried to sell to other persons, after he had submitted the claims to Kester and Kettenbach and had their permission to do so (pp. 2327-2328).

Dwyer's version of his connections with Kester and Kettenbach relative to the timber enterprises is, that the first business he had with them in that regard was that he did some work for them cruising timber in the Potlatch country and on the St. Maries and Palouse Rivers (pp. 3298-3299), for which he was paid \$6 a day (pp. 3303, 3367); that he then worked a summer for the Clearwater Timber Company, and in the fall he began working for Kester and Kettenbach again and cruised a great deal of timber for them (p. 3304); that in 1902 he cruised some timber for Kettenbach on the Potlatch in T. 42, R. 1 E., and that there was about a section of it (pp. 3366, 3367).

The Lambdin claim in T. 42, R. 1 E., the earliest entry involved in these suits, was entered in the spring of 1902 (pp. 1969-1970) and, as will be pointed out later herein, that entry was fraudulently made and was procured by Kester, Kettenbach, and Dwyer, acting in concert.

Kettenbach, testifying for the defense as to the relations that existed between them, said that Dwyer was

employed to work for them cruising lands, estimating timber, and buying timber lands for them.

Q. Now, when did you first have Mr. Dwyer employed?

A. Oh, really, when I first took an interest in timber, you may say, up in what is known as the Potlatch country; he cruised out some claims up there, and on his recommendation they were purchased; and he cruised out some vacant land, and on his recommendation there was some scrip laid; and we grouped together a little bunch up there and finally sold them to the Potlatch Lumber Company (pp. 3431-3432).

He further testified that Dwyer was paid \$6 a day for his services and a commission on the land that he purchased for them. "Whenever there was work to do, he was the man that always did it for us, and I don't recollect whether he worked up in the Clearwater for us before he cruised out the State lands or vice versa" (p. 3432). He also said Dwyer was to have had an interest in the State land deal, and had it gone through he was to have had a fourth interest in them and Kester and Kettenbach were to have had three-fourths interest, but instead they paid him for his services (p. 3433). On cross-examination Kettenbach testified that among the first claims cruised for them by Dwyer were the claims of Cornell and Schafer about 1901 (pp. 3492, 3493, 3494), and that he suggested to one Samuel Hutchings that he should take up a timber claim (pp. 3505-3506).

Kester testified on behalf of the defense relative to the relations between himself, Kettenbach, and Dwyer as follows:

Direct:

Q. How did you come to become interested in the timber business?

A. Well, Mr. Kettenbach and I had *some funds that we wanted to invest*, and we thought we would buy some timberland (p. 3142).

* * * * *

Q. What business relations did Mr. Dwyer sustain to you and Mr. Kettenbach; what did he do for you, what class of work, and how did he do it?

A. Well, Mr. Dwyer was employed by us at different times in cruising and looking after timber, protecting it from fire, and at various times he purchased lands for us.

Q. And how was he paid?

A. On which he was paid a commission, and he was paid wages and compensated for his work (p. 3211).

On cross examination he testified that Dwyer was to have had a third interest in the timber on the State lands, and in response to the question whether or not Kester and Kettenbach were in partnership in the timber claims, said, "Well, we never considered it such. It was a joint interest. There wasn't a partnership; never was considered by us—we never considered that we were partners. I dare say, in the ordinary term of the expression we would be considered partners, on account of our close association, but as far as our interests were concerned there they were joint interests; he had paid his share of it and I had paid my share of the cost of it.

Q. But when the Cornell and Lambdin and Schafer claims were bought you and Mr. Ketten-

bach were purchasing timber claims under this arrangement, this joint interest, were you not?

A. Yes.

Q. And that is the way you started into it, was it not? I understood you to say that you had some funds that you and Mr. Kettenbach thought you would like to invest in timber.

A. Yes; in these matters under consideration (pp. 3231-3232).

CIRCLE K CHECKS (K).

William Dwyer expended between \$50,000 and \$120,000 of Kester and Kettenbach's money in acquiring timber claims for them. This money was expended in advancing money to entrymen to make their initial applications to file, for final proof, and in paying their expenses incident to taking up the claims, the expenses of the different persons that went out to view the timber, and in paying for said land when they conveyed it to Kester and Kettenbach (pp. 2329-2331, 2776, 3663, 2651, 2768-3221 Kester). Though Dwyer never had an account at the Lewiston National Bank, this large amount of money was drawn from the bank by what is known as the Circle K (K) checks, and the drawing of said money from the bank, as aforesaid, covered a period from 1902 or 1903 to 1907 or 1908 (pp. 2329, 2330, 2651). The Circle K (K) check was the regular blank form of the Lewiston National Bank check signed by William Dwyer, in one corner of which appeared the letter K with a circle about it, which indicated that these checks were used in the Kester-Kettenbach timber transactions and were to be charged to their account. These checks were held as cash items

at the bank for periods ranging from one to three weeks and at times until they had aggregated \$2,000 or \$3,000, when they would be taken up at the convenience of Kester and Kettenbach by the individual checks of Kester and Kettenbach, one-half the amount being paid by each, and at a later period, when they had the Kester-Kettenbach timber account, they were charged to that account or were taken up by the joint check of Kester and Kettenbach drawn on that account (pp. 2329-2332 Robnett; 2776-2780 Chapman; 3221 Kester; 3374-3375 Dwyer).

Chapman testified he did not think that the Circle K checks began before 1906, and that they amounted in the aggregate to about \$50,000. He further said these checks were taken up by Kester and Kettenbach and later went into their joint account—timber account (pp. 2777-2778). Chapman is mistaken as to the date of the beginning of these checks, as will be seen later. The timber account of Kester and Kettenbach was not opened until December 13, 1906. In 1903 and 1904 a number of instances occurred where Kester and Kettenbach deposited money to Kitty E. Dwyer's account to reimburse it when checks given by Dwyer in the timber transactions were mistakenly charged to it (pp. 1993, 3759). During the period that the Circle K checks were in use Kitty E. Dwyer, wife of William Dwyer, had an account at the Lewiston National Bank. William Dwyer also checked against this account for his personal expenses by a check similar in all respects, except that it was not marked (K). At times in drawing checks for the Kester-Kettenbach timber deals Dwyer would fail to add the (K) to the checks, and they

would be charged to the account of Kitty E. Dwyer. When this mistake would be discovered, these checks would be put back in the cash as "cash items" and a deposit slip made crediting Mrs. Dwyer's account the amount of the check mistakingly charged to her account, and the check thus returned to the cash would later be taken care of by Kester and Kettenbach (pp. 2331 to 2333 Robnett; 2778-2779 Chapman).

The following are instances of such mistakes being corrected:

On November 7, 1903, there is a deposit slip in the handwriting of George H. Kester depositing to the account of Kittie E. Dwyer \$266.55. On the margin of the deposit slip is marked "Ex. Bill by K. & K." (p. 1933). On March 30, 1906, there is another deposit ticket in the handwriting of George H. Kester depositing to the account of Kittie E. Dwyer \$320 by George H. Kester. On December 4, 1906, a deposit slip at the Lewiston National Bank was made depositing to the account of Kittie E. Dwyer \$81.25. On this check is a K in a circle and the slip is made out in Robnett's handwriting. On December 17, 1906, another slip of the same description for \$146.65 was made. On July 3, 1907, a deposit slip in favor of Kittie E. Dwyer for \$468.35 was made and marked in the margin "K. & K." This latter slip is in the handwriting of George H. Kester. On August 31, 1907, another deposit ticket was made for Kittie E. Dwyer in the sum of \$12.50 and marked "By W. F. K. account Frank Bonney." That slip is in the handwriting of W. F. Kettenbach (pp. 1993-1994). Another instance is where Dwyer had checks cashed in order that

he might give twelve entrymen \$8 each with which to pay the filing fees at the Land Office. These checks by mistake were charged at the bank to the account of Kittie E. Dwyer. It was discovered the next day that William F. Kettenbach, in order to reimburse her account in that amount, made out a deposit slip in the sum of \$96 in her favor and on the reverse side of the deposit slip are the names of the twelve entrymen (p. 3759). Further mention will be made of this transaction in connection with the entries of the persons whose names appear on said last mentioned deposit slip.

Though Kester and Kettenbach did not testify as to the aggregate amount of the Circle K checks and Dwyer said they did not amount in the aggregate to \$25,000 (p. 3375), Kester testified concerning them as follows:

I will say about the Circle K checks: Those were really as a memorandum or a sight evidence of indebtedness incurred by Mr. Dwyer and in the principal sum *for expenses or for these initial payments on lands that he might go out and contract for.*

Q. They were on the regular bank check, though?

A. Yes; they were on the bank check, and signed by Mr. Dwyer, and those checks came into the bank and were taken up by Mr. Kettenbach and myself or charged into our Kester and Kettenbach account (p. 3221).

The Kester and Kettenbach account mentioned by Mr. Kester, and also by Mr. Chapman, was opened December 13, 1906, and the first entry in that account is not a deposit but is a check charged to the same for

\$2,781.50, which created an overdraft of that amount (p. 1986), and said account continued to be overdrawn for many thousand dollars, with the exception of a small credit balance in the following March and April, until July 7, 1907, when overdrafts amounted to \$19,863.52 (pp. 1989-1990).

Notwithstanding the agreement and conspiracy entered into between Kester, Kettenbach, and Dwyer and the arrangement Robnett had with Kester and Kettenbach, as testified to by him, and Robnett's testimony as a whole, are denied by the defendants, Kester, Kettenbach, and Dwyer—a greater part of his testimony having been read by counsel for the defense to said defendants in the form of questions, and their answers being mere denials—Robnett's testimony is corroborated in part by the testimony of the defendants and other witnesses, and is fully corroborated by other contemporaneous facts and circumstances. From the testimony of the defendants themselves it appears that two bankers having funds to invest (funds of the Lewiston National Bank), in 1901 engaged in the acquisition of timber lands jointly; that from the time they first became interested in timber to the date of acquiring by them of the last claims we have any record of Dwyer, a timber cruiser, was employed by them at a salary and on commission to cruise, estimate, purchase timber for them, and to guard it against fire, and was to have an interest in certain timber they were endeavoring to secure, "and whenever there was work to do he was the man that always did it for us." The money used during the entire period by Dwyer in said enterprise was withdrawn from the Lewiston National Bank

by means of the Circle K checks. Robnett, Steffey, and O'Keefe were also permitted by Kester and Kettenbach to overdraw their accounts for the purpose of furnishing entrymen the money for incidental expenses in initiating and perfecting entries that were made for the benefit of the defendants—Kester, Kettenbach, and Dwyer or Robnett—and in instances, which will be pointed out later, in which Steffey and O'Keefe had given notes to the bank to cover such overdrafts, Kester and Kettenbach later paid such notes, each paying one-half thereof.

So call the scheme that Kester, Kettenbach, and Dwyer entered into among themselves and the arrangement that Robnett had with Kester and Kettenbach, as has been pointed out, each a conspiracy, partnership, joint interest, agency, or what not, it will be shown herein that they began the acquisition of timber lands by acting in concert in soliciting entrymen to make entries of timber lands for the defendants; that they acting in concert induced a number of persons to enter timber claims under agreements made prior to filing upon the claim; that in consideration of the defendants furnishing such persons the money with which to enter and pay for the claims and all incidental expenses, said entrymen, upon obtaining title thereto, would convey the same to the defendants, or to one of them, at fixed prices; that they acted together in contesting claims of persons who had settled upon them and after obtaining relinquishments from such persons, in locating their kinsfolk and friends upon said claims under the timber and stone act, said entrymen subsequently conveying the claims to the

defendants; that practically every dollar used in the entire enterprise was furnished the entrymen by Kester and Kettenbach or by Dwyer, Robnett, Steffey, and O'Keefe, and that the money so furnished by Dwyer, Robnett, Steffey, and O'Keefe was withdrawn from the funds of the Lewiston National Bank, of which Kettenbach and Kester were president and cashier, respectively, with the consent and connivance of Kester and Kettenbach, for which amounts, with the exception of the funds withdrawn by Robnett, they held themselves personally responsible; and they continued these relations and engaged in similar conduct to the last chapter or until the last timber claim involved in the present cases had been entered for and acquired by them; and by following their acts and transactions, step by step from the beginning to the end, the conclusion can only be that they agreed among themselves at the outset to induce entrymen to make entries in fraud of the timber-land laws and not for the sole use and benefit of said entrymen, but for the use and benefit of the defendants, and that the entries involved herein were made and conveyed to the defendants, or to one of them, or are now held for the use of the defendants pursuant to said scheme.

**PERSONS SOLICITED BY KESTER, KETTENBACH, AND
DWYER WHO DID NOT MAKE ENTRY.**

F. D. MORRISON.

In the summer of 1902 William Dwyer solicited F. D. Morrison, of Lewiston, to engage in the timber business with him. It was suggested that Morrison furnish the "grubstake and either pace or carry a

compass." Dwyer stated he had arranged with Kester and William F. Kettenbach for the necessary money to engage in this enterprise, and that Dwyer was to get 40 acres out of every 160 acres thus acquired and that Morrison was to share equally with Dwyer (pp. 1218 to 1221); and that he could make arrangements for some one to locate on the land (p. 1223), as there were always "a lot of d—— chair warmers you could buy at your own price" (p. 1220).

JOHN P. ROOS.

In 1902 or 1903 George H. Kester approached John P. Roos, a resident of Lewiston, on the streets of that place and asked him if he had been upon a certain section of timberland and inquired whether he had used his right. Roos replied in the negative, whereupon Kester asked him what he would take for his right and said he would give him \$200.00 for it (pp. 1210-1211).

SAMUEL C. HUTCHINGS.

In 1902 one of the defendants told Samuel C. Hutchings, a patrolman at Lewiston, that he would give him \$100.00 to take up a timber claim. Hutchings declined the proposition, and said he wouldn't do it, but stated that he had a friend who might accept the offer (pp. 1202, 1203, 1204). The next day he sent Rowland A. Lambdin to the defendant who had broached the subject to him. Hutchings does not, at this time, recall which of the defendants it was (p. 1204), but the record shows, as heretofore mentioned, Kettenbach made the proposition to him.

WYNN W. PEFFLEY.

In the fall of 1903 Wynn W. Peffley, while residing at Lewiston, had a conversation with George H. Kester relative to taking up a timber claim. Kester told him that there was a party leaving for the timber in a few days and that he could accompany them and that the timber claim would clear him about \$150. Two or three days later William Dwyer asked Peffley if he was ready to go, stating that a party was going out on the train that afternoon. Peffley told him that he had decided to let the matter drop. He had never talked with Dwyer about a timber claim before (pp. 1205-1207).

ANDREW J. SHERBURN.

In the summer of 1904 Dwyer asked Andrew J. Sherburn, at Lewiston, why he didn't locate on a timber claim. Sherburn responded that he had located a timber claim and also a homestead claim. Dwyer answered that that didn't make any difference, that he could take up another claim under an assumed name. Sherburn sold his homestead to William F. Kettenbach the spring or winter before he testified in these causes (pp. 1214 to 1217).

CLAIMS INVOLVED.**THE LAMBDIN ENTRY.**

Robnett heard Kester say to William F. Kettenbach in the latter's office at the Lewiston National Bank (p. 2217) that Lambdin had agreed to file upon a timber claim for \$100.00 and deed it over to him after proof. Kettenbach replied that if Kester knew that Lambdin was all right for him to go ahead and have Dwyer make

arrangements to take him in the timber; later Lambdin came to the bank and inquired of Kester where he should meet Dwyer to go to the timber and Kester answered that he would make arrangements and let him know. At the same time the subject of what Lambdin was to receive for his claim was discussed and it was arranged that Kester would pay his expenses. Lambdin wanted to know if he needed money whether it would be advanced to him and deducted from the \$100.00 he was to receive for his "right." Kester said, "I think we can arrange that all right" (pp. 2217, 2218). These conversations were before Lambdin filed upon the timber claim. Lambdin was employed in a laundry. He made his entry April 25, 1902. Shortly after Lambdin filed Kester let him have \$25.00 (p. 2219). The day Lambdin made proof he deeded the claim to Kester and William F. Kettenbach. Though at the trial in February, 1910, of Kester, W. F. Kettenbach, and Dwyer upon an indictment charging them with conspiracy to defraud the United States of a large quantity of its valuable timber lands and wherein the entry of Lambdin was alleged to have been made and conveyed to Kester and Kettenbach in fraud of the statute, Lambdin declined to testify upon the ground that any evidence he might give would tend to incriminate him, and for the same reason he refused to give evidence or to testify on the trial of these cases, he at the trial of said defendants upon the same charge in the spring of 1907 did testify on behalf of the Government and his evidence on that occasion is corroborative of the statement herein made by Robnett relative to his entry. On that occasion he testified that

he had been approached by Hutchings, and that immediately thereafter he called upon Kester at the bank, who told him he would give him \$100.00 if he would take up a timber claim and after proof deed it to them (Kester and Kettenbach), and that they would furnish all the expenses in the transaction; that he made his entry under that arrangement and conveyed the same to Kester and William F. Kettenbach the day he made proof (pp. 2154-2195, 2257-2264).

THE SHAEFFER ENTRY.

Fred W. Shaeffer made a timber and stone entry May 5, 1902. At that time he was employed as a janitor at the Lewiston National Bank (pp. 448, 449); that shortly before that time Kester asked him if he had ever taken up a timber claim and told Shaeffer that he could make \$100.00 if he would take up a claim. This conversation took place at the bank and Kester told Shaeffer to arrange his work so that he could go to the timber with Dwyer the next day. Kester told him he would pay the expenses to the timber and Shaeffer went to the timber with Dwyer the next day (pp. 450-451). Kester paid the expenses, gave him the money to pay the filing fee and for the publication (p. 454). On the day on which Shaeffer was to make final proof he advised Kester of that fact and Kester gave him \$430.00 for that purpose and suggested that when he was asked at the land office where he had received the money with which to make proof he should say he had borrowed half of it. Immediately after making proof Shaeffer returned to the bank and gave Kester his final receipt and the latter gave him \$100.00 (pp. 456, 457, 458).

The next day Shaeffer, at the request of Kester, signed a deed conveying his timber claim to Kester and William F. Kettenbach (pp. 458, 463). Robnett testified that Kester told him that Shaeffer was going into the timber and take up a timber claim and that they were going to give him \$100.00 for his right. Kester also said he had offered Shaeffer \$100.00 and told him it would help pay for a lot he had bought (in Lewiston) and he (Shaeffer) seemed very much pleased and was perfectly satisfied to sell his right for \$100.00 (p. 2222).

Apart from the entries procured by Kester, Kettenbach, and Dwyer personally, are the groups of entries known as the Robnett group, the Emory and Colby groups, the O'Keefe group, and the Steffey group. These groups take their names from the persons other than Kester, Kettenbach and Dwyer who took a prominent part in the procuring of the making of said entries and acted as agents of and in concert with Kester, Kettenbach and Dwyer throughout the transactions relative to said entries.

In the order of the dates, the next entries made, composed the Robnett group.

ROBNETT GROUP.

The entries forming this group are the Maris, William B. Benton and Joel H. Benton, initiated in the summer of 1902; the entries of Robertson, Nelson and Hansen, filed in February, 1903; the Waldman, Little, Harrington, Pierce, Bashor, the three Longs, Morrison, Hyde, Ferris, and Robinson, made in March, 1903, and the Gammon entry filed in May, 1903.

THE MARIS ENTRY.

Carrie D. Maris-Rexford made timber and stone entry July 15, 1902 (p. 2070). At that time she was employed as a clerk in a dry-goods store at Lewiston (p. 2071). Shortly before making the entry, "it was just at the time they were taking up claims," Robnett met her on the street and asked her why she didn't take up a timber claim. She replied, "How can a working girl save up money enough to take one of those timber claims?" Robnett replied that it wasn't necessary for her to have the money; that if she took up a claim he would furnish all the expense money and find a purchaser and that when she had made proof he would find a buyer and the expense money would be deducted from what the claim brought and they would divide the profits between them; Robnett stated that a great many other persons had done the same thing. That was before she viewed the claim (pp. 2072-2073). Several days later Robnett sent for her to come to the Lewiston National Bank. There she met Robnett in the directors' room and she arranged with him to take up a timber claim on the terms which he had suggested and Robnett gave her the money for expenses to the claim and return (pp. 2074-2075). Upon returning from the land she met Robnett again at the bank. He escorted her to the door of the land office, gave her sufficient money to pay the filing fees, and when the time came to make proof she again met Robnett at the bank and he gave her \$411.00. This money she took directly from there to the land office and made proof and paid the purchase price of the claim with said money (pp. 2076-

2077). Mrs. Rexford subsequently conveyed to Robnett, who in turn conveyed the claim to Kester and W. F. Kettenbach (p. 2078). In all this transaction she used but \$1.00 of her own money, and that was because on one occasion she was just \$1.00 short in some money Robnett had given her. She received \$106.00 for her claim. She was to convey the claim to whomsoever Robnett directed. That was the understanding before she viewed the claim or applied to enter it (pp. 2079–2080). Did not pay location fee. She was at the Lewiston National Bank six or seven times during the transaction (pp. 2080–2081). “A. He was to sell it, yes. He told me I had nothing to bother with at all, nothing to see to at all; he would attend to everything. That’s the way I understood it when I went up.” Deed to Robnett dated June 2, 1903 (pp. 1582–1583). The answer to question 17 at final proof of Mrs. Rexford, “Where did you get the money with which to pay for the land and how long have you had the same in your actual possession?” is, “I earned it clerking in stores; three months” (p. 2084). Robnett says Kester knew all about the arrangement he made with Mrs. Rexford and the conveyance to Kester and W. F. Kettenbach was in accordance with the previous arrangement that Robnett had with them (pp. 2283–2284). The court held that the Maris entry was made in accordance with agreement entered into between Robnett and the entrywoman before the entry was initiated, in violation of law, and that the entry was therefore invalid; that Kester and Kettenbach were not aware of the illegal agreement and their purchase of the claim was in good faith and for value in the ordinary course of business (pp. 305, 308).

THE WILLIAM B. BENTON ENTRY.

William B. Benton, son of Joel H. Benton and cousin of William F. Kettenbach, filed on a Timber & Stone claim August 27, 1902. Final certificate issued November 21, 1902. Conveyed to Robnett January, 1902 (1903) (pp. 1628-1629). Robnett testified that prior to the making of this entry Benton made an agreement with Robnett that the latter would furnish him the money to enter and purchase a timber claim and pay all incidental expenses, and that after proof was made and the property sold, after deducting the expenses, the profits would be divided between them. Robnett was to have the disposition and control of the land. It was further arranged that notwithstanding Benton did not have an account at the bank he was to draw checks upon the Lewiston National Bank for the amounts that he needed and Robnett was to protect the checks. This was done. After proof the claim was deeded to Robnett, who conveyed to Mrs. Elizabeth White, the mother-in-law of William F. Kettenbach, and she in turn conveyed to the Clearwater Timber Company. All the defendants knew of the arrangement and agreement between Robnett and Benton (pp. 2308-2309). The negotiation for the transfer to Mrs. White was conducted by the defendant W. F. Kettenbach, as was also the transfer from Mrs. White to the Clearwater Timber Company. The Clearwater Timber Company declined to take the claim directly from either Kester, W. F. Kettenbach, or Robnett, but agreed to take it if it would come through Mrs. White (pp. 2309-2310). At the time Benton made his entry he was associated with Robnett

in the timber business as a cruiser (pp. 3517 to 3519). Prior to locating on the timber claim Robnett had paid a locator to locate Benton on unsurveyed land. The court held relative to this claim that the evidence is insufficient to warrant a cancellation of the patent (p. 293).

JOEL H. BENTON ENTRY.

Joel H. Benton, uncle of W. F. Kettenbach, testified that before filing on his timber claim, he had arranged with Robnett that he would squat on a homestead in the Clearwater country on unsurveyed land and remain until it was surveyed. Robnett was to furnish him the money for all his expenses while he was there and after final proof he was to convey the land to Robnett. This arrangement was made in the directors' room at the Lewiston National Bank. Robnett carried out his part of the agreement. A Mrs. Mary Harris and her two daughters, Jeanette and Ethel, had entered into the same arrangement with Robnett, and though Joel Benton had no deposit or account at the Lewiston National Bank, he was furnished a check book by Robnett and was to draw checks on the bank for the expenses of the party during their stay on the homesteads, and Robnett was to protect the checks, and this he did (pp. 636-641), filing the sworn statement initiated entry to the timber claim of Benton, August 28, 1902. While Benton was still on the homestead before filing on timber claim, Robnett visited Benton at the homestead, and it was agreed that Robnett would furnish the money to carry him through. This Benton understood to mean that he would furnish the money for final proof on the timber claim (pp. 642, 643). Benton was not on claim

before filing. Robnett paid the filing fees and the understanding before the entry was made was that Robnett would furnish him money for final proof. On the day proof was made, Robnett did furnish Benton \$400.00 for that purpose. Benton did not give him a note or pay any interest. Later conveyed the claim to Robnett (pp. 644, 645, 646, 647). The money for the proof was given Benton in the directors' room in the Lewiston National Bank. He went directly from there to the land office and made proof (pp. 654-655). Before making proof, Robnett coached Benton as to what he should testify at the land office relative to where he had gotten the money; told him he should say the money was his, which he did at the land office. Benton admits that was not true. Also testified at the land office that he had a bank account at the Lewiston National Bank (pp. 655-656). Benton testified, "Well, my understanding was that he was to furnish me the money to prove up on, and there wasn't no understanding between him and I about that timber and stone, only as I might have thought I would let him have it, as long as he had furnished me the money. I thought I would let him have it, but I never agreed to sell that land at all. My understanding was that I was to let him have the land the same as it was with the homestead. There was nothing said about it" (pp. 660-661).

At the trial of Robnett on a criminal charge growing out of the entry of Benton, Benton testified that, "the arrangement, as I understood it, was that I was to take up the land and he was to furnish all the money, pay all the expenses, and after the expenses were taken out, it was to be divided up" (p. 654). At final proof Ben-

ton testified that the money with which he made proof he "earned selling goods" (pp. 655-656), and that he had had a bank account at the Lewiston National Bank during the last six months. At the criminal trial referred to Benton testified that he had the same agreement with Robnett relative to the timber and stone claim as he had relative to the homestead. Benton does not remember so testifying at former trial, but says, "As I said before in my last testimony there, that was my supposition in my own mind that that same thing went through, but the fact was, there wasn't a word said about selling the land to him, the timber and stone." At the trial of the present cases, the following occurred: "Q. Then when you had your first talk with Robnett about taking up a timber and stone claim, do I understand you to say that it was your understanding then that your timber and stone claim was to be taken up under the same arrangement you had as to the homestead? A. I would like to answer that by—— Mr. GORDON. Answer it yes or no, and then explain what you have to say about it. A. I can say yes in a way. Here is the way of it: I remember the question asked me, 'What do you mean by saying he would see you through?' Q. Explain now what your understanding was. A. Why, that he would furnish me the money to go ahead for final proof and expenses. I think that question was asked me. I know that question was asked me. Q. What were you to do with the land after you got your proof made? A. Well, there wasn't a word said about it. Q. What was your understanding that you were to do with it? A. Well, my understanding was he was to furnish me the money to prove

up on, and there wasn't no understanding between him and me about that timber and stone, only as I might have thought I would let him have it as long as he had furnished me the money. I thought I would let him have it, but I never agreed to sell the land at all" (pp. 659-660). "I supposed—my understanding was that I was to let him have the land" (p. 661). Robnett told him as long as he didn't have an agreement in writing it would be all right, but that related to the homestead (p. 662). Robnett testified that while Benton and the Harrises were still on their homesteads he went to see them, and on that occasion he arranged with Benton to file on a timber claim under the same arrangement that he had relative to the homestead. He told Benton that he would stand the expenses and that he would procure a purchaser, and when the property was sold they would divide the profits. This was agreeable to Benton, and the entry was made and sold under that agreement (pp. 2311, 2312). The claim was subsequently conveyed to Robnett and by him to Mrs. White and by her to the Clearwater Timber Company. Kester and W. F. Kettenbach knew of the agreement Robnett had with Benton and, for the same reasons as were controlling in the claim of Wm. Benton, the title was passed to the Clearwater Timber Company through Mrs. White (pp. 2312-2313).

The district judge said of this claim that he would be inclined to hold it for cancellation were it not for the rights of the Clearwater Timber Company as an innocent purchaser (p. 316).

THE WASHBURN ENTRY.

Pearl Washburn, who made an entry under the Timber & Stone act January 19, 1903, could not be

found. Wm. F. Kettenbach furnished her the money with which to take up the claim (2313). She made proof April 16, 1903, and on the same day gave Wm. F. Kettenbach a mortgage on the claim to secure Wm. F. Kettenbach's \$400. This mortgage and the receiver's receipt issued to her at the time she made proof were recorded at the request of Wm. F. Kettenbach two days later, April 18, 1903 (pp. 1631-1632). At final proof she swore that the money with which she purchased the land she received from her father's estate and that she had had it for three years. (Plfts. Ex., 50 G.)

This claim is not of the Robnett Group and it is mentioned here only as we are showing the evidence relative to the claims in the order of their entry. It was conveyed to one McGrane, and the title later put in the name of John E. Chapman, teller of the Lewiston National Bank, and on June 7, 1907, conveyed to the Clearwater Timber Company (p. 1515). Kettenbach says he negotiated the sale of the land from McGrane to the Clearwater Timber Company. This was done about the time that Kester and Kettenbach had been sentenced upon a conviction in the "Land Fraud Cases" and deeded all their other timber claims to the Idaho Trust Company.

THE ROBERTSON ENTRY.

Van V. Robertson made a timber-land entry February 24, 1903, made proof, and paid the purchase price for the same May 20, 1903, and on the latter date gave a mortgage to Robnett on said claim to secure a note for \$500.00 to Robnett, payable in one year (p. 791). At final proof he swore that the money

with which he paid for the claim he had made in his business and had the same in his actual possession for two years (p. 3839). Robnett testified that at the time Robertson took up the timber claim he was in the saloon business; that Roberston came to see him about entering the claim and Robnett told him he would locate him and that when it came time to make proof if he did not have the money he would get it for him. He further told him that a deal was on to sell a number of claims and that he could get him \$200.00 out of his claim as soon as the deal was closed, and that if the deed was not closed immediately after proof, he would have to give a mortgage to secure the money. It was agreed that Robnett was to control the disposition of the claim and that to make the \$200.00 Robertson was to convey the claim to whomsoever Robnett designated. That was perfectly satisfactory to Robertson (pp. 2303-2304). This conversation was before making the entry, and upon this agreement Robertson filed and made his proof. Robnett furnished him the money with which to make proof and took Robertson's note on the same day for \$500.00 and assigned the note to the Lewiston National Bank. This was done pursuant to an arrangement that Robnett had with Kester, and Kester knew of the agreement Robnett had with Robertson (p. 2305). Robertson testified that he had an interest in a cigar store and saloon, and learned through his partner in cigar business, Mr. Miller, that there was a party going to take up claim. He made arrangements with Knight to locate him, but does not know that Knight told him what he could do with the timber claim.

It was understood that if a man got a deed to the timber claim he would have a chance to sell it in a short time. It was generally understood that there would be buyers at Lewiston the same as there had been at other places. It was common talk there. That Robnett told him to make his final proof; and that he would handle it on a commission; that they would have an opportunity to sell, as they would have a large body of it together. Robertson said that he transferred his account of \$2,850 from the Camas Prairie Bank to the Lewiston National Bank December, 1902, or January, 1903 (pp. 774-781). In this Robertson is mistaken, as he did not open an account at the Lewiston National Bank until April 10, 1903; then he deposited \$100.00 (p. 2003). He said he told Robnett he didn't think he could make the proof. Robnett said it would be too bad to abandon the claim, as there was a good chance to make money out of it. He received the money with which to make proof from Robnett at the bank (pp. 784-785). Kester wrote him that the mortgage was due and he would like to have the money. Kester made the proposition to take the land and cancel the note. Robertson lost his location fee, the estimate on the timber, and the expenses of the trip to the timber (pp. 786 to 789). Robertson deeded claim to Lewiston National Bank September 27, 1904 (p. 1507).

The district judge does not comment upon the validity of this entry. He says:

He (Robnett) testified that Kester, who was the cashier of the bank, knew of his alleged illegal agreement with the entryman; this Kester

denies. It seems quite incredible that if Kester had been advised of the facts disclosing the invalidity of the transaction he would have authorized or acquiesced in the use of the funds of the bank for any such purpose; apparently there was no personal interest in the transaction to blind him to the obligations of his trust * * * But it is not easy to believe that, without hope of profit either to himself or to the bank, whose interests it was his duty to protect, Kester would have authorized the abstraction of \$500 of the bank's funds to be loaned upon real estate, the title to which he was advised was invalid by reasons of the fraud of the entryman (p. 303).

THE NELSON ENTRY.

John E. Nelson, of Lewiston, filed on a timber claim February 24, 1903. Nelson testified that H. R. Miller, deceased, who was in the cigar business with Van V. Robertson, was the first person who spoke to him about taking up a timber claim (pp. 1038-1039). Miller lived in the house with Nelson, and told the latter he felt satisfied that if he wanted a claim that he could arrange it so that he could get one. He met Robnett before filing his sworn statement, but said he had absolutely no arrangement with him (pp. 1040-1041). "Q. And did you make any arrangements with him (Robnett) about the claim? A. Absolutely none. Q. What part did he take in the transaction? A. Well, I don't know that it was anything more than a sort of a promoter, to help things along, as far as I could see. Q. Was there any arrangements made with him about the money that was to be used in paying for this claim? A. Why, Mr. Miller attended to that, as far as I was

concerned—— Q. Well, did you get your money from Mr. Miller for your expenses, etc.? A. No, I paid my own expenses. I paid all my expenses—paid the filing fees and all. Q. Did you use your own money to make your final proof? A. No, I didn't. Q. Now, from whom did you get that? A. As near as I remember, it was handed to me by Mr. Miller, and who he got it from I don't know. Q. It wasn't given to you by Robnett? A. I can't remember as to that. Q. Do you remember where you received that money? A. Yes; I believe it was in the Lewiston National Bank. Q. Now, who gave it to you there—Mr. Miller? A. Well, I am satisfied that Mr. Miller had his hands on the money. Who it came from I don't know. Q. Did you and Mr. Miller go there and get it from Mr. Robnett? A. I think we did, yes, sir." It is clear from reading the testimony that Nelson did not go upon the land before he made his entry. Wm. B. Benton located him. "Q. And did you pay him for his services? A. Yes, I think he got \$200.00 out of it. Q. Well, I know; but did you pay him anything? A. I didn't pay him myself; no. Q. And you didn't give it to anybody to pay him, did you? A. No. Nelson received \$400.00 at the Lewiston National Bank the day he made proof. Went directly from the Lewiston National Bank to the land office upstairs and made proof. Q. Now, was the matter discussed at the time that you received the money as to where you should say you got it when you went to the Land Office? A. No. Only that it was mine. Q. And who told you to say that? A. I don't remember (pp. 1041 to 1048)." He was told this by either Robnett, Benton, Knight, or Miller. It was not

a direct suggestion but indicated to his mind that he was to say that it was his money. At final proof in answer to the question whether he had paid out of his own individual funds the expenses in connection with the filing and whether he expected to pay for the land with his own money, he answered "Yes," and as to the question at final proof "where did you get the money to pay for this land, and how long have you had it in your actual possession," he answered "earned it in my trade; about one and a half years"—and the actual cash with which he purchased the land he received from Robnett a few minutes before (pp. 1050 to 1051). The same day he made a mortgage to secure the money that had been thus furnished him and later conveyed to Mr. Thatcher. Made \$60.00 in cash out of the claim (p. 1052). Never paid any interest on the note and the amount of this note was taken out at time of final settlement (p. 1057). Robnett testified that he met Nelson on the street and asked him if he didn't want to take up a timber claim. He said he did but he hadn't any money and Robnett told him he had made arrangements whereby he could take care of whatever money was needed; if he would give a note for the location fees, that Curtis Thatcher would furnish the money for the final proof and also for locations fees; that he could get him \$200.00 out of his claim. Nelson said that that would be all right and it was perfectly satisfactory, and that if he was certain that he would get that much he would file. This conversation was had before filing. Robnett was to furnish him all the money he needed except the expenses up to the timber and Robnett was to control the sale of the land (p. 2314). Robnett told

Thatcher that the money was to be furnished by him to Nelson for location fee and for final proof; that he would give a mortgage after proof and that Nelson's claim was to be included in the sale of a number of timber claims that he was bunching up to sell in a deal that was pending; told Thatcher that before any money was advanced (p. 2315). Nelson made proof May 22, 1903, and a receiver's receipt was issued to him at the same time. On that day he gave a mortgage to secure the note given for the money furnished by Robnett and on July 31, 1903, the receiver's receipt and mortgage were recorded at the request of Kester (p. 1504). Nelson deeded claim to Mrs. E. W. Thatcher May 18, 1908, while the present cases were pending (p. 1505).

The court held that in material respects the story told by Nelson relative to this claim is in conflict with the testimony of Robnett; and Thatcher denied any knowledge of the alleged agreement between the entryman and Robnett and that the evidence as a whole is insufficient to warrant cancellation of the patent (p. 302).

THE HANSEN ENTRY.

Soren Hansen, who made application to file on a timber claim February 26, 1903, testified that Robnett induced him to take up the claim. Robnett met him on the street one day before filing and asked him if he didn't want a timber claim. Hansen replied that he didn't want a claim, that he didn't have the time, and that he didn't have the money to spare. Robnett told him that he would attend to the whole matter and would furnish the money, and that it was not necessary for him to go to the land. Hansen asked what there

was in it and Robnett responded that he ought to be able to get \$300.00 to \$500.00 out of the place and that he would be able to sell it for him. Hansen told Robnett that he thought it would be all right; if he could attend to it for him and if he (Hansen) wouldn't have to go after it or furnish the money for Robnett to go ahead (pp. 514, 517, 518). Hansen had never seen the land nor had he been anywhere to look for it. Robnett at the time of filing told him that he could not get in to the land as it was covered with snow and that it was not necessary for him to see the land anyway (p. 519). Robnett took him to some attorney's office and had sworn statement prepared. Robnett furnished the money for filing fees and the \$400.00 purchase price (pp. 520-521). Never had an account at the Lewiston National Bank but Robnett gave him the money at the bank (p. 521). Subsequently on Feb. 17, 1906, at Robnett's request he executed a deed to the claim in blank and delivered it to Robnett. Nothing said as to what the purchase price would be (p. 523). Afterwards on Feb. 16, 1908, he made and executed another deed at the request of Robnett for the same claim to E. W. Thatcher (p. 522). Later made and executed another deed to the same property to Wm. F. Kettenbach March 5, 1909. Prior to executing the last-mentioned deed he executed deed to the Clearwater Timber Company (p. 523). On cross examination in response to the question whether or not the sworn statement that he did not have an agreement directly or indirectly, etc., is true, Hansen answered "Yes, it was true to the extent, unless I told him he could sell it for me or he told me he could sell it for me, unless that

infringed on that—I am not—” (p. 529). Before signing the deed to Kettenbach, delivered the deed in which the Clearwater Timber Company is grantee to Robnett. Received \$60.00 from Robnett when he conveyed to Mrs. Thatcher (p. 525). Robnett testified that he met Hansen on the street and asked him if he didn’t want to take up a timber claim. Hansen said he did but he didn’t want to use any of his money, as he needed it for his farm. Robnett told him there was a chance to make \$200.00 if he wanted to take up a claim; told him about a deal he had pending and that he would get him all the money he needed from Thatcher, that if he wanted to go ahead he would get him \$200.00 or \$250.00 out of the claim. To earn this \$200.00 Hansen was to file, make proof on the claim, give a mortgage for the money that Robnett advanced, if the property had not been sold at that time, and that Robnett was to have the handling of the claim and Hansen was to deed the claim over to whomsoever Robnett should designate and receive \$200.00. Hansen accepted this proposition, Robnett furnished all the money, and the deeds were made as above recited (pp. 2316–2317). Robnett told both Kester and Kettenbach the arrangement he had with Hansen a number of times (p. 2317). The \$60.00 Robnett gave Hansen he received from Will Kettenbach. The deed was made to the Clearwater Timber Company, because they had arrangements with the agent of that company to buy the claim, and he delivered the deed to the Clearwater Timber Company to Kettenbach (p. 2318). Hansen made proof June 5, 1903, and on the same day gave Curtis Thatcher a mortgage to secure the money Robnett had furnished

Hansen. The final receipt given at date of final proof and the mortgage were recorded at the request of Kester Oct. 10, 1903; and the deed to the Clearwater Timber Co. was recorded at the request of Wm. F. Kettenbach (pp. 1491-1492).

At final proof Hansen swore that the money with which he paid for the land he made in farming; that he had the same in his actual possession for two years; that he had a bank account at the Lewiston National Bank; and that he made a personal examination of the smallest subdivision of said land by walking over the land February 19, 1903 (pp. 3811-3812).

As to this entry the court said: "I am convinced that the entryman, who testified on behalf of the Government, desired to be entirely frank and stated the facts as he understood them, and remembered them, and according to his testimony the entry should be held to be valid" (p. 304).

THE WALDMAN ENTRY.

Robert O. Waldman made entry under the timber and stone act March 6, 1903 (p. 3729). Robnett testified that Waldman was a salesman in a variety store at Lewiston. Robnett went to his place of business and asked him if he wanted to take up a timber claim. Waldman responded that he was building a house and wouldn't take up a claim unless he could sell it right away (p. 2319). Robnett told him that if he wanted to take up a claim that he had one and that he would give him \$400.00 for his right and that he would furnish him all the money necessary for taking up the claim, and the \$400.00 would be clear. To earn his \$400.00 Waldman was to file on a timber claim, make

proof, and deed the same to Robnett as soon as the proof was made. Waldman accepted the proposition and said he was willing to sell his right for \$400.00. Robnett paid Waldman's expenses up to the timber and back and the filing fees, and at the time of final proof gave him the money for that purpose. Waldman made proof, and that afternoon or the next day made a deed and Robnett gave him \$200.00. Robnett was the grantee in the deed. Robnett in turn deeded the claim to the Lewiston National Bank (p. 2320). He negotiated for the conveyance to the bank with Frank W. Kettenbach when he left the bank. It was, however, understood that if the claim wasn't sold that it was to go to the Lewiston National Bank. That understanding was had with Robnett, Kester, and Wm. F. Kettenbach. Frank Kettenbach knew of the arrangement Robnett had with Waldman, as Robnett told him (p. 2321). Waldman on final proof testified that he purchased the land with his own money; that he earned the same clerking, and had had the same in his possession for three years (p. 3921). Waldman testified that Robnett told him he would locate him on a timber claim for \$100.00, and if Waldman would furnish the money to purchase the claim and pay all expenses incident thereto he could sell the same to whomsoever he desired; or that Robnett would furnish him the money for filing, the necessary expenses incident to going to view the claim, and the money with which to purchase the same and give him \$400.00 for his right, Waldman to make a deed to Robnett for the claim. This conversation was at the Lewiston National Bank about two weeks prior to filing on the claim.

Waldman told Robnett he much preferred to furnish his own money. A week later it developed that Waldman could not spare the money and he advised Robnett of this fact at the bank. It was then agreed that Waldman should enter the claim; Robnett to furnish all the money necessary for that purpose and to purchase the land, and all expenses incident thereto, and to pay Waldman \$400.00 for his right as soon as Waldman made a deed to Robnett of the claim. This last conversation was three or four days before Waldman filed (pp. 3726-3727). Robnett gave him \$15.00 to pay the expenses of going to view the timber. Waldman returned to Lewiston and visited Robnett at the bank again before he filed, "and he told me (Waldman) also, of course, that I was to state that there was no prior agreement to sell, and coached me on certain other questions which I have since forgotten, but, at any rate, so that I was to answer 'yes' or 'no' to the questions, according to the requirements of the application" (pp. 3728-3729). Robnett gave him the money with which to pay the filing fee and for advertising when he filed the sworn statement. Robnett notified him of the time to make proof and asked him to come to the bank to see him. Waldman went to the bank and in the directors' room Robnett gave him \$400.00 with which to make proof. On that occasion Robnett coached him as to the answers he should give to the questions asked him at final proof (pp. 3730-3731). He was to say he earned the money which Robnett had given him (p. 3731). "I (Waldman) was told what to say and what answers to make to the questions as they were put to me, stating that above

all things I must state that there was no previous agreement to sell, and that on the way down (from land office, being in the same building as the bank) I should stop in at the bank and I should sign a deed to Robnett." Robnett also told him to state that the money was his own (p. 3731). Knight and Benton were in the room with Waldman and Robnett when these instructions were given (p. 3732). The same day that he made proof he deeded the claim to Robnett and received \$150.00. He received the balance in accordance with the agreement with Robnett later (p. 3733). The whole matter turned out as he understood it in the original conversation with Robnett, he carrying out his part of the agreement and Robnett perfecting his (p. 3734). The deed from Waldman to Robnett was dated May 26, 1903 (p. 1637).

The court held this claim to be unlawfully entered and invalid and that the Lewiston National Bank, under the circumstances stated, can not claim protection as an innocent purchaser, and ordered that the patent issued for said claim be canceled (p. 290).

THE LITTLE ENTRY.

John H. Little, a clerk in a department store at Lewiston, entered a claim under the timber and stone act March 20, 1903. First talked with Robnett about taking up a claim (p. 1609). Robnett came to the store where he was working and solicited different employees to take up claims and asked him also to take up a claim. Little told him he couldn't afford it. Robnett said that he could make the arrangements so that he could afford it. Robnett told him he would see

him at lunch. He further said he had arranged with parties who would advance the money. Little wanted to know if it wasn't a little dangerous and Robnett replied, "No; everybody in the country is doing it," and named the persons whom he had induced to make entries and stated that there were a number of others going to view the land that afternoon saying "we would just like to have you go ahead and take yours this afternoon" (p. 1611). Little told him that he didn't have the money, not even to pay for the trip to the timber. Robnett said, "Well, we'll fix that all right." Robnett told him to go to Thatcher & Kling's store and Kling gave him \$15.00. He and a man named Storer gave Thatcher a note for \$15.00 each. Went into the timber with Wm. Benton and Ed. Knight. Robnett arranged for Little to go to the timber with Benton and Knight and he understood that Robnett was a partner in the locating business with them (p. 1612). In reply to the question whether he went to the timber claim, Little said they went over the mountain and plowed around through the snow a little bit and Knight said "This is about as far as we need to go," that the snow was on the ground and they couldn't see the stakes; it would be impossible. "Q. Now, what were you to do with this claim after you took it up? What was your arrangement? A. Well, the understanding was that Robnett was to find me a buyer for the claim. He guaranteed to sell the claim for me. Q. Did he tell you when he would sell it? A. Why, he said the chances were favorable for an early sale; in fact, he guaranteed an early sale—a verbal agreement was all" (p. 1613). Little never had a description of the land

but upon his return from the land Robnett, who held the descriptions of the land, took him to a lawyer's office, had the papers prepared and escorted him to the land office. Robnett paid the filing fees. Robnett notified him of the time to make proof (p. 1615). When it was time to make final proof Little went to the Lewiston National Bank. Robnett took him to the directors' room and told him that he would get him the money. Robnett then went to Kester and told him to give Little \$560.00. Little went to Kester and Kester gave him that amount and Little then went to the bookkeeper's window where Robnett was and Robnett required him to give him \$125.00 for location fees. Did not give Kester a note for the money (p. 1616). He and Robnett then left the bank, and went upstairs in the bank building to the land office and Robnett told the receiver of the land office that Little was ready to make his final proof and he then paid the receiver \$400.00 of the money he had gotten from Kester. Robnett told him to try to show at the land office that he was earning the money himself and Little asked him if it wasn't a little dangerous and he said, "No; that thing was done every day" (pp. 1717-1618). At final proof Little testified, in response to the question where he had gotten the money to pay for the land and how long he had had it in his actual possession, that he had made it selling property. Two months. He gave Robnett his final receipt that day and signed a note for \$760.00, making a bonus of \$200.00. That was immediately after he had paid the money in the land office (pp. 1618-1619). He conveyed the land to Wm. F. Kettenbach, the latter giving him \$30 over the mortgage (p. 1619). Receiver's

receipt dated June 15, 1903, and recorded at the request of Wm. F. Kettenbach June 20, 1903. Mortgage the same date recorded at the same time by Wm. F. Kettenbach. Mortgage and note made to Robnett (pp. 1620-1621). Though money was gotten from Kester, the recording of mortgage was done at request of Wm. F. Kettenbach five days after Little had gotten the money secured thereby. On cross-examination this question was asked: "Q. Had you any contract or agreement, expressed or implied, to sell your land to Clarence Robnett, at the time you made your final proof? A. Well, yes; I considered it such. He induced me to take up the claim on the promise of disposing of it for me" (p. 1625). Robnett testified that before Little filed he had told him that he was locating people on a number of claims and asked him if he didn't want to enter one. He said that he did, but he didn't have the money to go ahead. Robnett told him that he would arrange for that and pay all the expenses; that he had deals on for disposing of the timber and that he could get him from \$150.00 to \$200.00 for his claim. Little said all right, and that was prior to filing (p. 2285). Under that arrangement Little went to the timber, and returned and filed. In another place Robnett testified that he told Little he would get \$200.00 or \$250.00 for his right. That's what he would make out of it if the deal went through. Little made a mortgage to Robnett for the money furnished and Robnett assigned the mortgage and the note to Wm. F. Kettenbach without recourse the same day it was taken, right after proof; Robnett had told Kester and Kettenbach of the arrangement he had with Little

(pp. 2286-2287). The records of the office of the recorder of Nez Perce County show that the receiver's receipt issued to Little, and the mortgage Little gave Robnett were recorded by Wm. F. Kettenbach June 20, 1903, five days after their date (pp. 1705-1706).

THE HARRINGTON ENTRY.

Ellsworth M. Harrington, a brother-in-law of Robnett, entered a timber claim in March, 1903 (pp. 1347-1348). He first talked with Robnett about taking up a claim. He testified that Robnett asked him if he wanted to take up a claim. He told him he did. Harrington told Robnett he didn't have the money. Robnett said he could arrange that part of it. That was before Harrington filed (p. 1350). He thinks Robnett told him he wouldn't need to go on the timber before he filed; that he was familiar with the timber up there. Harrington made a pretense of going to the timber, however, with Wm. B. Benton and the three Longs (p. 1351). Benton had to return to Lewiston at a certain date, so they all turned back before they arrived at the timber. Later Harrington went to the bank and got a description of the land from Robnett (pp. 1352-1353). Robnett said Harrington would have to swear that he had been on the land. He thinks he paid the filing fee, but is not positive (p. 1353). The talk with Robnett relative to getting the money with which to make proof was had before he made the application to file. Nothing was said as to what there was in this transaction for him nor about selling the land. He thinks Robnett said that the land was worth about \$1,000.00 Robnett first broached the subject to him and

suggested that he would advance the money for the purpose of taking up the land (pp. 1354-1355). Robnett was dealing in timber claims, and if he had a chance to sell he had Harrington's permission to sell it. There may have been something said about Robnett assembling a number of claims, and that he had a person who was going to take them, and that he would put Harrington's claim in. "Q. You mean you didn't have any written agreement (to sell your claim)? A. No; nor no verbal agreement in that way; not positive. He was dealing in timber claims, and if he had a chance to sell it he had my permission to sell it. Q. That was the original understanding, was it not? A. I don't think there ever was any exact understanding made about it. It was a kind of a—I don't know whether you would call it a mutual agreement or not; we were brother-in-laws, and naturally, as he was in the timber business, he would handle my claim for me. Q. And you expected that, didn't you? A. Yes, sir" (pp. 1355-1356). Harrington received the money with which to make proof in the directors' room of the Lewiston National Bank, from Robnett. He thinks he got \$500.00. At that time something was said about a question that he would have to answer as to where he had gotten the money with which he was making proof and how long he had had the same in his possession. Robnett told him he would have to say he proved up with his own money, but the money he used in the land office was the money that Robnett gave him. Harrington said he stretched the truth a little when he testified that he had worked for it and had had it in his possession three or four months (pp. 1357-1358).

Two or three days later he signed a note for the \$500.00, which included the location fee, which was held out. He gave a mortgage at the same time he signed the note and later sold the claim. He received \$299.40 or \$299.60 from the claim, and Robnett negotiated the sale. He sold it to W. F. Kettenbach (pp. 1359-1360). Robnett testified that Harrington first talked with Ed. Knight and then came to Robnett's house one evening to see him about taking up a timber claim; that he, Robnett, was interested with Knight and Will Benton in the location of claims. Robnett told him if he would go ahead and locate and let him handle the claim and put through the deal the claim would net Harrington \$300.00 for his right, the balance above that to go to Robnett for his trouble. Harrington wanted to know how about the money in case the deal didn't go through, and Robnett told him that he had arrangements whereby he could get the money to pay for the location fee and pay for the final proof, Harrington to give a mortgage at that time and a note also. The understanding was that Harrington was to deed the claim to whomsoever Robnett might designate and accept the \$300.00. Harrington said that was all right; he would leave the matter in Robnett's hands and deed the claim whenever he was asked to (pp. 2321-2322). Robnett paid the location fee and says that Will Kettenbach advanced the money for final proof. Robnett negotiated with Kettenbach for the money and got the same when it came time for final proof and gave it to Harrington, who gave a note to Robnett for the amount of the location fee and money advanced and a bonus. Then Robnett endorsed the note without recourse to

Will Kettenbach. When the note was taken, at the time of final proof, the mortgage was also given, but the latter was not assigned. Kettenbach knew of the agreement between Harrington and Robnett, and Robnett had Harrington deed the claim to Will Kettenbach (p. 2323). Robnett had had previous conversations with Kettenbach about this and other matters. Robnett had some papers, memoranda, plats, and checks which he used in timber transactions in private boxes at the Lewiston National Bank. Said he had demanded the boxes of the bank and had been refused (p. 2324). "Q. Did you take any care, Mr. Robnett, of the character of the people that you would locate on these claims? A. Yes; I never located anybody but what I had the handling of their claims; that is, would have the right to sell the claims. Q. Did you locate anybody on any claim who wouldn't make an agreement with you before they entered it to convey it to whom you would direct? A. No" (pp. 2325-2326). Harrington made proof June 15, 1903, and the receiver's receipt was issued to him the same day. Harrington on the day following gave Robnett a mortgage on said claim to secure the money Robnett had furnished him. Both of these papers were recorded, at the request of Wm. F. Kettenbach, June 20, 1903, five days later (p. 1703).

THE PIERCE ENTRY.

Wren Pierce, who made a timber-land entry March 21, 1903, could not be found (p. 1428). Concerning this claim, Robnett testified that Pierce was either a carpenter or painter, a transient in Lewiston, who remained there about six months and left immediately

after he had made his proof. Arthur Barney brought Pierce to Robnett and Robnett explained the conditions under which he would furnish him a claim to file on, and Pierce stated he would be willing to go ahead and file on a claim and accept \$200.00 for his right. The conditions were that Pierce was to go up and see the claim, file, and make proof on the same. Robnett was to furnish him the money to pay expenses and final proof, then sell the claim for him and give him (Pierce) \$200.00 (pp. 2287-2288). This Pierce did, and the day he made proof Kettenbach bought the claim. No mortgage was taken. Three claims were bought outright by Kettenbach, and this was one of them. In order to get the money to pay the location fee Pierce gave his note. Robnett took the note to Curtis Thatcher, who advanced the money (p. 2289). Robnett took the money out of the bank and gave it to Pierce for final proof. Robnett negotiated the sale with Kettenbach. Kettenbach knew about the arrangements that Robnett had with Pierce. "Q. How do you know that?—A. I told him all about it" (p. 2290). Pierce made proof June 17, 1903, and the records of the county recorder show that the receiver's receipt issued to Pierce on that day, and the mortgage he gave Robnett the same day to secure the money Robnett had furnished Pierce with which to take up the claim, were recorded by Wm. F. Kettenbach three days later. The deed to Kettenbach is dated May 31, 1904 (pp. 1428-1429, 1714). In making proof Pierce swore that the money with which he purchased the land was his; that he had worked for the same, and had had it in his possession for two months (pp. 3893, 1714).

Robnett was mistaken about Pierce not giving the mortgage. He says there were three out of eleven who, instead of giving mortgages, deeded their claims to Kettenbach directly after proof. He thinks two of the three were George Morrison and Wren Pierce (pp. 2289-2290). Three persons besides Pierce did convey to Kettenbach the claims the day they made proof. They were Joseph B. Clute, George Morrison, and Edward M. Hyde. None of the three gave mortgages to secure the money advanced them for proof, and, as will be hereafter shown, Robnett has confounded either Clute or Hyde with Pierce in this respect.

THE BASHOR ENTRY.

Benjamin F. Bashor took up a timber claim March 21, 1903 (pp. 2090-2091). Bashor testified that Robnett first spoke to him about taking up the timber claim in February of that year. Bashor refused at first, but after talking with Robnett several times he became interested, and Robnett told him that Benton and Knight were going to take a crowd to the timber on a certain day and he consented to go with them. He went to view the claim during the fore part of March. This talk was in the directors' room at the bank (p. 2092). Bashor gave his note to Robnett for the location fee either at the time he filed or at the time he made proof. The note covered the whole amount; \$400.00 for final proof and \$100.00 or \$125.00 for location fee. He paid his own expenses and paid filing fee at the land office (p. 2093). Bashor was in the directors' room of the Lewiston National Bank with Robnett twice, once just before he filed and again at the time

of final proof. Upon final proof Robnett, a few minutes later, gave him his personal check on the bank, which Bashor had cashed and used that money with which to make proof. On two different occasions Robnett suggested that the money was Bashor's (p. 2094). Before the land office Bashor testified that he had made that money while he was county assessor and that he had had it six months, which was not true. On the same day that he made proof he gave a mortgage to Robnett to secure the note and thinks that he also turned over his receiver's receipt to him. Robnett cautioned him to say at the land office that he had not borrowed the money (p. 2095). Bashor met W. F. Kettenbach on the train one day and told him he had just received a letter from Robnett relative to the timber land, and that Robnett wanted him to give a deed to the property to satisfy the note and mortgage. He told W. F. Kettenbach that Robnett wanted him to turn it over to Kettenbach. Kettenbach said he was giving about \$30.00 for these claims. Bashor thinks the amount Kettenbach mentioned was \$1,000.00, which would amount to just about \$30.00 above note and interest. He afterwards did convey the land to Wm. F. Kettenbach (pp. 2096-2097). Robnett testified in regard to Bashor's claim that he (Robnett) called him over the phone; told him the next time he came down town to come into the bank to see him, and Bashor complied with the request. Robnett told him that if he wanted to take up a timber claim that he could furnish him one. Bashor said he didn't have the money. Robnett told him to go ahead; that he would arrange for the money for the final proof. Bashor wanted to

know how much he would get out of it. Robnett told him \$200.00 or \$250.00. Robnett was to have the selling of the claim and all above the \$250.00 or \$200.00. Bashor said, "All right, then, I will go ahead and take a claim" (pp. 2290-2291). That was the arrangement between Robnett and Bashor before Bashor went to view the claim. Bashor furnished his own money for expenses in going to see the claim and gave his note for the location fee. W. F. Kettenbach furnished the money for final proof. Bashor gave note and mortgage for that also, the note and mortgage running to Robnett. The entire amount, \$725.00, was included in one note, which was given right after final proof (pp. 2291-2292). Robnett immediately endorsed the note over to Kettenbach without recourse. The mortgage was not assigned. Some time afterwards Robnett wrote Mr. Bashor, who was then at Peck, to come and see him in regard to the claim. Robnett made him an offer of a certain amount for Mr. Kettenbach, which offer Bashor accepted and deeded the claim to Wm. F. Kettenbach (p. 2292). Kettenbach knew the conditions under which Robnett was dealing with Bashor. Robnett told Kettenbach of the circumstances at the time of the location and also at the time he spoke to Kettenbach about loaning the money for final proof (pp. 2292-2293). The receiver's receipt given Bashor when he made proof June 17, 1903, and the mortgage he gave Robnett the same day were recorded by Wm. F. Kettenbach June 20, 1903, three days later (p. 1697).

THE FRANCIS M. LONG ENTRY.

Francis M. Long, father of John H. and Benjamin F. Long, made a timber-land entry March 26, 1903. He

testified that Robnett first spoke to him about taking up a timber claim (pp. 1278-1285). Robnett told him and his sons that they (meaning Benton and Knight) had some claims that could be located on. Long did not have the money with which to take up a timber claim. He borrowed it of the bank (Robnett). The agreement was that Robnett was to lend him the money to pay all expenses and to pay the Government fees; in fact, "to pay for the whole business." This was a few days before he located. Nothing was said about selling the land (p. 1280). Though before the grand jury in 1905 Long testified that Robnett told them that he had a party who would buy the claims in July, he further testified in the present cases that Robnett gave them the money in one lump sum and they gave their notes (referring to himself and sons); that Benton, Knight, and one Harrington went with them when they went to view the land (pp. 1281 to 1283). They went nine or ten miles toward the claim and Benton said it wasn't necessary for them to go any farther. They would have gone to the claim, but Benton said it wasn't necessary; they had done as much as most any of the others had done. They protested, but they returned to Lewiston (p. 1284). After their return to Lewiston, Long saw Robnett, and went to Mr. Nickerson's office and get the filing papers. He thinks they were prepared when they got there. His filing papers and the boys' (his sons) filing papers were all there together (p. 1286). He paid the fees at the land office out of the money Robnett had furnished him for that purpose. At final proof he paid some-

thing like \$400.00 at the land office (p. 1287). He thinks he must have gotten the money to make final proof from Robnett and signed the note on the same day that he made proof. Does not remember just how much he received from Robnett, but it was enough to cover all expenses (pp. 1287-1288). The money with which he paid for the land he had gotten a few minutes before from Robnett (p. 1289). Signed mortgage to Robnett for \$728.75 on day he made final proof. Long also said if he paid the location fee, Robnett gave him the money to pay it, and that was included in the mortgage. He does not remember whether he paid the location fee personally or not (p. 1290). He received \$25.00 over expenses for the claim. Sold the claim to Wm. F. Kettenbach. Made the settlement at the bank with Will Kettenbach. He never paid any interest on the note he gave Robnett, and does not know what became of it (p. 1292). Though the money with which Long purchased the land he had received from Robnett but a few minutes before, he swore at the land office in giving proof that it was his own money; that it was the proceeds of some stock he had sold and had had the same in his possession for seven or eight years (pp. 1289, 3872). Long made proof June 18, 1903, and received a receipt from the receiver of the land office that day. On the same day he executed to Robnett a mortgage on the claim for the money Robnett had furnished him. Both of these papers were recorded at the request of Wm. F. Kettenbach four days later, June 22, 1903 (p. 1294). The deed to Kettenbach is dated August 9, 1904. Consideration, \$1.00 (p. 1709).

THE JOHN H. LONG ENTRY.

John H. Long at the time he made entry of a timber claim, in March, 1903, was employed by Emory and Colby as a common laborer, \$2.50 per day. He said that Robnett first spoke to him about taking up a timber claim. He called him into the Lewiston National Bank and they talked part of the time at the window and part of the time in the directors' room about the matter (pp. 1252 to 1254). As near as he can remember it, he says the proposition Robnett made was that he would locate him on a timber claim, would loan him the money with which to prove up and would charge him \$125.00 for location fee, and Long was to pay \$200.00 for the use of this money. On the day he made proof his father and brother (Francis M. and Benjamin F. Long) went with him to the bank and gave a note payable one day after date to Robnett (pp. 1254-1255). He didn't have the money to buy a timber claim with at the time he entered the same. Robnett said that Benton would locate them (p. 1256). W. B. Benton is a cousin of Wm. F. Kettenbach. Joel H. Benton is Wm. B. Benton's father. Robnett made the arrangements with Benton to take the Longs to the timber. Ed. Knight and Ellsworth Harrington went with them (p. 1257). They went to within twelve miles of the land (p. 1258). Benton argued that it wasn't necessary to go farther, stating that if they had made an attempt that was all that was necessary. "Q. Didn't he tell you that under the arrangement under which you were taking up that timber it wasn't necessary for you to see the land?—A. Why, I think probably he did mention that" (p. 1259). The sworn

statement is dated March 26, 1903 (p. 1261). John Nickerson prepared the sworn statement, and Long does not think he read it (pp. 1261-1262). Robnett told him and his father and brother to go to Nickerson's office for the filing papers. Long did not pay for preparing the filing papers (p. 1263). Long saw Robnett again in regard to getting the \$400.00 to make proof with. He thinks it was on the same day that proof was made. He saw him at the bookkeeper's window at the bank. His father and brother were with him and he gave them the money there. His father and brother got their money at the same time (p. 1264). Long went directly to the land office and paid in the money that Robnett gave him, and made proof. Robnett said something about how they were to answer questions at the land office as to where they had gotten the money. He said it was a matter of form and it would probably be better to say it was their own money. At the land office Long swore that the money with which he paid for the land he earned working in a sawmill and other places (Pp. 1265-1266). He gave a note and mortgage to Robnett the day he made proof. The note was assigned to Kettenbach by Robnett without recourse (p. 1266). He made deed July 21, 1904, to Wm. F. Kettenbach; consideration, \$1.00 (pp. 1272 to 1274). Kettenbach gave him \$27.50 when he conveyed the claim to him (pp. 1273-1274). "Q. Do you remember whether or not in this first talk with Mr. Robnett he explained to you that you could realize about \$800 over and above all your expenses, and that he was figuring with a company who would buy your timber?—A. Yes, sir. Q. And that you asked him

when the timber would be sold, and he said some time before the end of the year?—A. Yes, sir. Q. Did you make the arrangements for your father and your brother at the same time to take up claims?—A. Yes, sir” (p. 1296). On the day Long made proof, June 18, 1903, he executed to Robnett a mortgage on his claim to secure a note for \$710.00, which Robnett endorsed to Kettenbach without recourse, as aforesaid. This and the receiver’s receipt, issued the same day, he delivered to Robnett, and both papers were recorded at the request of Wm. F. Kettenbach four days later (p. 1710). At final proof Long testified that the money Robnett had furnished but a few minutes before was his; that he earned it working in a sawmill and other places (p. 3870).

THE BENJAMIN F. LONG ENTRY.

Benjamin F. Long, son of Francis M. Long and brother of John H. Long, made a timber and stone entry in March, 1903. He testified that he was employed as a laborer on a farm, or mill hand, at wages of \$2.50 to \$3.00 per day (pp. 1297–1298). His brother, John H. Long, made all the arrangements with regard to taking up his claim, then told him about it. J. H. Long said he (Benjamin F. Long) was to get the money from Robnett and Knight (pp. 1298–1299) with which to enter the claim. Benjamin F. Long never talked with Robnett about the timber claim himself. He started out to look at the claim before he filed on it with his father and brother, Ellsworth Harrington, Benton, and Knight. They went up as far as Dent, which is about 16 miles from the claim, but he has never been on the claim. They did

not go to the claim because Benton said it wasn't necessary; that none of the others went upon the claims (p. 1300). They paid their own expenses on the trip toward the claim and Robnett paid the locating fee for them. He does not know why he paid a location fee when they didn't take him to the land (pp. 1301-1302). After they returned to Lewiston, Robnett directed him to have his filing papers prepared and Nickerson performed this service for him (p. 1302). He does not know much about this transaction as he was working at the time and did just what he was told to do in the matter, signed any papers they told him to sign. The day that he made proof he received all the money that he paid in the land office from Robnett. He does not remember the amount (pp. 1303-1304). He thinks he gave the receiver's receipt to Robnett and also signed note and mortgage that same day after he had made proof (p. 1304). He gave the note to Robnett who turned it over to W. F. Kettenbach. Kettenbach wrote them and wanted him to pay off the mortgage, and later he sold the claim to Kettenbach, but does not remember how much he got out of it. "Q. Was it \$25.00? A. Well, I couldn't say to that either. It wasn't very much, I know." Long never paid any interest on the note or any taxes on the land and never had any of his own money in the deal except his expenses on the timber and the first filing fees. He received the same amount that his father and brother got for their claims (pp. 1306-1308). Robnett gave him the money to make final proof at the Lewiston National Bank. There was something said at that time about what he was to

say at the land office, that he must say that it was his own money and that he had worked for it. This he did, but it was not true (pp. 1308-1309). His brother told him Robnett thought he could sell the claim for about \$1,500, and it was that conversation that induced him to file on the timber claim (p. 1310). When he entered the claim he thought he was going to get \$1,500 over and above all expenses, although it wasn't clear that the \$1,500 wasn't the whole amount. As the money was to be loaned him and he was not to use any of his own money he didn't pay very much attention to it. He was only interested in getting as much as he could (p. 1311). Long made proof June 18, 1903, made a mortgage to Robnett the same day to secure money Robnett had advanced to him. Receiver's receipt and mortgage were recorded at the request of W. F. Kettenbach four days later and Long conveyed claim to Kettenbach August 9, 1904 (pp. 1708-1709). At final proof Long swore that the money with which he had paid for the land and had received from Robnett the same day, he had worked for—had had the same in his actual possession for two years (p. 3876).

Robnett testified in regard to the claims of Francis M. Long, John H. Long, and Benjamin F. Long that he first spoke to John H. Long on the street; told him him he had timber claims to locate people on, and that if he wanted to go ahead and file that he could get him \$200.00 out of his claim. Long said "All right, I will think it over, and I think my father and brother want to locate also" (p. 2293). All three came to the bank to see Robnett one afternoon. Robnett went over the

whole matter with them. Told them where the timber was; that the locators would show them the claims, and when they returned to Lewiston they could go to the land office and file and after they filed they were to give Robnett a location fee or a note for it, and at the time to make their final proof they would give a mortgage to Robnett, arrangements having been made and the money would be advanced to pay for the location fee and to make proof. Robnett was to get them \$200 each out of their claims. They said that arrangement was satisfactory and filed pursuant thereto. They proved up and gave mortgages to Robnett for \$725 to \$750 each and on the same day that the notes and mortgages were given Robnett endorsed the notes to W. F. Kettenbach. Kettenbach knew about the arrangements that Robnett had with these entrymen before they filed on the land, Robnett having approached him (Kettenbach) to make loans on the timber claims and was having other conversations with him relative to the timber that Robnett was locating. Robnett afterwards assisted in getting the Longs to come to the bank and give Kettenbach deeds. The mortgages which the Longs gave to Robnett were not assigned to Kettenbach, but Robnett endorsed the notes to Kettenbach without recourse (pp. 2294-2295).

THE MORRISON ENTRY.

George Morrison, who could not be found at the time of taking testimony in these cases, entered a timber claim March 30, 1903 (p. 1634). Robnett testified that he was a carpenter and that he came to Lewiston with Wren Pierce and Edward M. Hyde, two other

entrymen. These three persons left Lewiston immediately after final proof was made, being transient artisans employed there upon some building then being constructed. Robnett testified in regard to Morrison that there were three entrymen who sold their claims (to Kettenbach and Kester) without giving mortgages; that two out of the three sold immediately upon final proof and the other later on. Morrison was one of the entrymen who sold immediately after making proof and Wren Pierce was the other (pp. 2289-2299). Robnett told Morrison that he would locate him on a timber claim, furnish him the money to pay the location fee and the amount necessary at final proof to purchase the land; that he had deals on whereby he thought he could dispose of the claim right after proof, but in the event he did not, Morrison would give him a mortgage for the money advanced, and as soon as he (Robnett) could sell the claim he would give Morrison \$200 out of it. Robnett was to pay him \$200 for his claim. This arrangement was made before Morrison had filed on the land. Robnett engaged the locator for Morrison, paid the location fee, and also the amount necessary to purchase the land. Robnett got the proof money from W. F. Kettenbach, and, instead of taking a mortgage or note to secure the same, took a deed to Kester and Kettenbach, the proof money was deducted, and Morrison was given the \$200. Kettenbach knew about the arrangement Robnett had with Morrison (pp. 2299-2301). At final proof Morrison testified at the land office that the money with which he purchased the land was his own; that he earned it at his trade and had the same in his actual possession

for two years (p. 3916). Morrison made proof June 26, 1903, and conveyed title to his claim to Kester and Kettenbach the same day. The deed was subsequently recorded by Kester (pp. 1634-1635).

THE HYDE ENTRY.

Edward M. Hyde, who, at the time of taking testimony in these cases, could not be found, made a timber-land entry March 30, 1903 (p. 1636). The evidence given by Robnett in regard to the Pierce and Morrison entries concerns also this entry. In speaking of these entries, Robnett said, "They were working, I think, on the Catholic Hospital." In regard to Hyde's specifically, Robnett said, "He was brought to me by Mr. Varney, who was a friend of mine, Varney getting \$15 out of the location fee of each entryman that he brought me. Robnett told Hyde that he would locate him on a claim in 39-3 and take his note for location fee; that he had a deal on for selling all of that timber, and that he could get him \$200 out of his claim for him "and if the deal was so that" he (Robnett) couldn't sell the claim at the time of proof he would advance him the money and he was to give Robnett a mortgage. The arrangement was satisfactory to Hyde, and Robnett furnished him all the money that was necessary to locate and purchase the claim. Knight and Benton located him. Robnett paid the location fee and Hyde filed. Robnett furnished Hyde the \$400 with which to make proof. He got this money from W. F. Kettenbach on the day proof was made. Hyde did not give a mortgage, but deeded the claim that same day to

Kettenbach and Kester. Hyde was paid \$200 for his claim, Robnett handed him the money, but W. F. Kettenbach gave Robnett the money for that purpose. Kettenbach knew of Robnett's agreement with Hyde. Robnett told him of that at the same time he told him about the arrangement he had with the other entrymen (pp. 2302-2303). At final proof, Hyde swore at the land office that the money with which he purchased the claim he had worked and mined for and had had it in his actual possession several months (pp. 3918-3919). Hyde made proof and paid for the claim June 26, 1903, on the same day he deeded claim to Kester and Kettenbach, said deed was later recorded at request of Kester (p. 1636).

THE FERRIS ENTRY.

Bertsel H. Ferris, who resides at Lewiston, made a timber-land entry March 31, 1903. He is an electrician, and at that time his salary was \$65 or \$70 per month (pp. 873-874). He testified that before making application to file he met Robnett on the street. Robnett asked him if he wanted to take up a claim. Ferris told him he did, but didn't have the money. Robnett said he could arrange for that. Ferris asked if he could get a claim for George Ray Robinson, too. Robnett thought he could. Robnett also thought he could sell the claims for them (pp. 875-876). Robnett suggested that it wasn't necessary to go on the claim and if they took the time to go to the claim it might be filed on before they had the time to make entry. This conversation was before they filed. All arrangements were made with Robnett (pp. 876-877).

Robnett gave Ferris and Robinson description of the land, and they filed without making an attempt to see the land. They think they received the filing papers in the directors' room at the Lewiston National Bank. Robnett said they would have to swear they had been on the ground. Ferris told him he had not been on the ground. Robnett told Ferris he could say he had been on the ground and it would be all right (pp. 879-880). Robnett was to furnish the money for the location estimate and final proof, and he was to sell the land (p. 881). When he made sworn statement at the land office, he swore he had been on the ground. He knew that wasn't true. Robnett and he had talked that over. Robnett notified him when it was time to make proof, and said, "Come over to the bank and I will get the money to prove up on" (p. 883), and Ferris then went to the bank with Mr. Robinson. Robnett gave them the money at the teller's window, and they went upstairs to the land office and made proof. Robinson and Ferris were in the directors' room with Robnett a couple of times. They looked over some papers. The questions they would be asked at the land office were written out on a paper and so were the answers they should make (pp. 884-885). Robnett, Robinson and Ferris went over a paper similar to the testimony of claimant on final proof and discussed the propriety of answering the questions. They went over the filing papers, too, the first time they were at the bank. He thought the final proof papers were shown them at that time also. He was given 400 and some odd dollars by Robnett with which to make proof (pp. 885-886).

He went directly from Robnett's office to the land office and made proof with the money that Robnett had given him. In the land office Ferris answered in relation to where he got the money, "Earned most of it in my trade and borrowed the balance" (p. 887). The facts were that he got the money that he paid on final proof from Robnett. He thinks Robnett and he went over that question before he went to the land office. Also answered at the land office that he expected to pay for the land with his own money. That answer also was not true. He thinks that was also discussed with Robnett (pp. 888-889). Made a note the day he got the money from Robnett for \$728.75. The note for \$125 he made on the date that he made his filing. He took the last mentioned note up with the one first mentioned (p. 889). When the note for \$728.75 was returned to him, it was endorsed by Clarence W. Robnett to Wm. F. Kettenbach without recourse. The day he made proof he gave a mortgage to Robnett to secure the payment of the note. Later Ferris deeded the land to W. F. Kettenbach, probably two years later. He didn't get any money out of the entire transaction (p. 890) and lost the money he had expended in filing fees (p. 892). Robinson was present at the conversation in the directors' room when they talked over the final proof questions (p. 893). The original understanding with Robnett was that he was to sell the land for Ferris. That understanding was had before he filed any papers. "Q. Would you have thought it right to sell to anybody but Robnett?" "A. I probably wouldn't if I had thought about it; I probably would have given him the preference (p.

900). Robnett testified that before Ferris took up his claim he approached Ferris on the street and asked him if he wanted to take up a claim. He said he did, but he had no money to pay the expenses and to file on the land. Robnett told him he had arrangements made whereby he could get the money, and he would sell the claim later for him and get him (Ferris) a couple of hundred dollars out of it. The agreement was that Ferris was to deed the land to whomever Robnett negotiated with for the sale of the claim, and Ferris was to receive \$200 for his right. Ferris accepted the proposition. Robnett took his note for the location fee and furnished him his final proof money, taking a note and mortgage on the day of final proof; also took the final receipt at the same time he took the notes. Robnett turned this note and receiver's receipt over to Kettenbach, endorsing the note without recourse. He surrendered the mortgage to Kettenbach, but didn't assign it. Kettenbach knew the arrangements Robnett had with Ferris, as Robnett told him about it at the time he made arrangements with him for all the loans; when he made arrangements to buy claims up and to furnish the money. He negotiated the transfer of the Ferris claim to Kettenbach (pp. 2296-2297). Ferris made proof on said claim June 26, 1903, and a receiver's receipt was issued to him at that time. On the same date he executed a mortgage conveying to Robnett title to his claim to secure his note of that date for \$728.75. The receiver's receipt and the mortgage were recorded at the request of W. F. Kettenbach July 1, 1903 (pp. 1701, 894).

THE ROBINSON ENTRY.

George Ray Robinson made a timber and stone filing March 31, 1903. He was an electrician, employed by Lewiston Light Company, the same company that employed Guy Wilson and Bertsel H. Ferris. His salary was either \$2 or \$2.25 a day. He testified that Bert Ferris first spoke to him about taking up a timber claim; that Robnett had some claims in view that they could get, and he went to see Robnett (pp. 1318-1319). Robnett told them (Ferris and Robinson) that claims were scarce but he had a couple that could be located on if they were fast about it and located before somebody else got to them. Robinson had no money with which to take up a claim. It was agreed that Robnett was to advance the money to make proof on the claim with and they were to pay the other expenses themselves. The claims were to be sold; that is, Robnett said he thought he had a buyer in view and when the claims were sold the locator was to have \$100 and the man that estimated the claim was to have \$125. Robinson was to get the remainder of what the claim was sold for. No price was set but Robnett said he could almost guarantee them \$500 clear, so that they could get \$500 above the selling price of the claim and expenses. That arrangement was made before they located on the land. He told them they had better file immediately because there were parties looking at claims and if they waited until they could go to see them they might be taken. They saw Robnett the next day in the directors' room of the bank and he sent them to Nickerson's office to have filing papers prepared.

They then went to the land office and filed on the claims and paid the filing fee. The arrangement with Robnett before they filed was that he had a buyer in view and he was to sell the land for them. In case he couldn't or didn't sell the land, they had the privilege of selling it to someone else. Robinson did not try to sell the claim but depended upon Robnett to make the sale for him (pp. 1319 to 1323). Robnett said he would sell the land about the 1st of September. It might have been July, that he was assembling a number of timber claims and he either had the people that were going to buy claims or he thought he would make the change and sell it to them. If it hadn't been for this arrangement with Robnett, Robinson wouldn't have taken up the claim. He gave him the description of the land he wanted him to locate on (pp. 1323-1324). He had never been up into this timber country and didn't know whether the claim he was filing on had timber on or not. At the land office he swore he had been on the land. He discussed this with Robnett. Robnett said no one would be the loser; the Government would get its money and Robinson could go and see the land afterwards and there would be no practical difference (p. 1324). Ferris and Robinson started to visit the land afterwards with Bill Benton. They went within a few miles of the claim and Benton didn't want to take them any farther (p. 1325). Robinson didn't care much about the land anyway, but he wanted to go on the land, partly for curiosity and then he would rather swear to the truth. He saw Robnett again at the bank the day they proved up and got the money from him, \$400, for that purpose,

and then went to the land office and made proof with the money Robnett had given him. The same day he gave a note to Robnett (pp. 1326 to 1328). They didn't see the claim at any time (p. 1329). Robnett and Robinson discussed the questions that would be asked him at the land office. Robnett showed them papers that had been filled out and they looked over the papers. Robnett went over several of them and Robinson and Ferris thought the answers were good enough for them (p. 1330). Ferris was with Robinson in the directors' room at the bank the day they made final proof. He does not know whether he felt free to sell this land to any one but Robnett or not (p. 1331). He didn't try to do it. He didn't have any intention of trying to; he left it all in his (Robnett's) hands. He did just exactly what Robnett told him to do during the whole transaction (p. 1332). The claim was sold to Kettenbach and Robinson realized \$71.25, the rest went to make up interest on the note (p. 1334). Fred Emory wanted Robinson to give him an option on this land. He asked Robnett if he could give the option before giving it to Emory (p. 1338). Robinson said he didn't have any agreement to sell to anyone; in explaining this he said he meant he had no person to sell it to; nobody was ever mentioned that the land was to go to, but Robnett had some one in view that he could sell it to; "He (Robnett) was to sell it; he was to sell the claims for us. If I hadn't thought he was going to take it off my hands I never should have taken it" (p. 1345). Robnett testified that Ferris brought Robinson to him. He explained the claims they had and the deals

they had on and told him he thought he could get him \$200 out of his claim and all the money for the location fee and for the final proof would be advanced; and after final proof he was to give a mortgage until the claim could be sold. He was to deed it to whomever Robnett designated when Robnett made a sale of it. Robnett talked to Robinson and Ferris at the same time. Robnett gave him the money for the locators and for final proof and took a note and mortgage for the money furnished (pp. 2298-2299). Robnett endorsed the note over to Kettenbach without recourse immediately after receiving it. Subsequently he negotiated the sale of the claim with Kettenbach. Kettenbach was advised of the arrangement Robnett had with Robinson. Robnett told him of the agreement before Kettenbach advanced the money for final proof (p. 2299). Robinson made proof June 26, 1903, and received the receiver's receipt at the same time. The same day he made a note to Robnett for \$728.75 and executed a mortgage to Robnett on the claim to secure said note. The mortgage and receiver's receipt were recorded at the request of W. F. Kettenbach, July 1, 1903. The deed to Kettenbach is dated October 16, 1905 (pp. 1116-1117).

THE GAMMON ENTRY.

Drury M. Gammon entered a timber claim May 12, 1903. At that time he was employed as waiter in hotel (p. 2101). His wages were \$40 a month (p. 2108). Robnett first spoke to him about taking up claim. Gammon testified that Robnett asked him if he wanted to take a timber claim. "I told him at first I didn't

know, and asked him how much there was in it if I wanted to take it up. He asked me if I would sell my right, and I told him 'no,' I wouldn't the way he wanted me to." He said he would see him again (pp. 2102-2103). Gammon had another talk with Robnett before he went to look at the land. Gammon told Robnett he would take up a claim and deed it to him for so much over and above expenses. He didn't state any amount at the time because he did not know what the expenses would be. Robnett was to furnish the expenses and Gammon was to deed the claim to him and get so much over and above expenses. Robnett was paying him so much for the timber on the land. That was the agreement he had with Robnett before Gammon entered the land (p. 2104). Gammon got the money to make the final proof at the bank from Robnett. It was something over \$400. With this same money he made proof (p. 2106). He remembered that he stated at the land office that the money was his and he had saved it up and had had it for six months. "Q. That wasn't exactly so, was it? A. Well, I didn't think it was any of their business where I got it at the time. Q. That wasn't exactly true? A. No; not at that time." At the time he made final proof he made a mortgage to Robnett which covered all the expenses that he had been put to in regard to this claim. Afterwards Robnett told him to make out the deed to him. He does not remember just how much Robnett gave him. He figured the expenses and what he sold the land for, and it figured that Robnett owed him \$200. Robnett gave him the \$200 (p. 2107.) "Q. Now, let's get back to the first conversation you had with Robnett

about taking up the claim. Can you hear? A. What's that? Q. You understand, do you? A. Yes. Q. Now, what did Robnett say to you? A. Oh, he just asked me if I wanted to take up a claim. Q. And what did he say there would be in it for you? A. Well, he asked me if I would sell my right for \$150.00. I told him no. Q. And how much did you tell him you would sell your right for? A. I didn't make any statement of what I would sell it for then. Q. Well, was he to furnish all the money? A. Well, the talk was then—he didn't say whether he would furnish it or not at that time. Q. And what were you to do to get the money for your right? (p. 2108). *Mr. Tannhill*. We object to that as calling for a conclusion of the witness and not a statement of the fact. *Mr. Gordon*. Q. What were you to do to get the money, Mr. Gammon? A. Oh, he didn't tell me anything. He knew that I knew what I had to do. He knew all about how I should file on the land. Q. Well, what were you to do with that land to get that money? A. Well, he said if I wanted to I could sell it back to him. Q. Well, isn't that what you were to do to get that \$150.00? A. Well, I told him I wouldn't sell my right that way. Q. And what way were you to sell your right? A. I was to let him have it if he would give me what the land would come to after final proof; if the land had so much timber on it, why he was to give me so much a thousand, or million, or whatever it was. Q. Well, that was your arrangement before you ever went up to the land, was it? A. Yes, sir. Q. And he carried his part of the arrangement out? A. Yes, sir. Q. And you carried your part of it out? A. Yes, sir. Q. And you got a little

over \$200.00 and he got the land? A. Yes" (p. 2109). Robnett says he went to Gammon and told him if he would file on the claim in 40-3 he would advance the money, and when the claim was sold would get him \$350 out of it. That was the first conversation he had with Gammon, and he said he would file and prove up and deed the claim under those arrangements. Robnett furnished the money for the trip into the timber and for the filing fee, \$9.00, and all the money for the final proof. The final proof money he got from Kester, and when it came time for final proof he had Gammon give a mortgage to Kester. He afterwards bought the claim, and thinks he gave Gammon \$350 (pp. 2306-2307). Gammon made final proof August 19, 1903, and the deed (consideration \$1.00) to Robnett is dated October 9, 1903 (p. 2110). Robnett deeded claim to Lewiston National Bank, and negotiated the sale with Kester, to whom he told of his arrangement with Gammon (p. 2307).

Of this claim the court said: "Considering all the testimony together, I am inclined to think that at the time the entry was initiated there existed between him and Robnett an unlawful understanding as to what disposition should be made of the claims when title was secured. There remains the question whether or not the Lewiston National Bank, in taking a transfer, was an innocent purchaser for value." The court then said that Kester denies that Robnett advised him of the unlawful arrangement between him and the entryman, and that "There are no general considerations, therefore, strongly tending to impeach or weaken his testimony, and in the absence of special reasons to the contrary I

think credence must be given to his version of what occurred in preference to that of Robnett. It must therefore be held that the bank took the title without notice of its infirmity" (pp. 304-305).

The record shows, as we shall further point out, very serious general considerations tending to impeach and weaken Kester's testimony, and why credence should not be given his evidence.

SUMMARY OF EVIDENCE CONCERNING THE ROBNETT GROUP.

From the foregoing it appears that there was a slight difference in the arrangements or agreements that Robnett had with the entrymen composing his group. The arrangements or understandings in each instance, however, were made before the entry was initiated.

The agreement between Robnett and some of the entrymen was that Robnett would furnish them the money with which to initiate and perfect their entry, and that after proof Robnett would give them a stipulated amount for their right; with others Robnett was to furnish them the money with which to enter and purchase the claim and to pay all incidental expenses and that after proof Robnett would sell the claim to some person or company for whom he was assembling claims and that the entrymen would receive a stipulated amount; and in other instances Robnett was to furnish them the money with which to enter and purchase a claim, and the entryman and Robnett would divide the profits, the approximate amount of profit being mentioned. In all cases Robnett was to have the control of and disposition of the claim.

The testimony of Robnett in these respects is corroborated in large part by the testimony of the entrymen and in other respects by the circumstances attending each particular entry. All of these entrymen, with the exception of Pierce, Morrison, and Hyde, who could not be found, appeared and gave testimony in these causes; Maris, the two Bentons, Hanson, Waldman, Little, Harrington, Bashor, the three Longs, Morrison, Lewis, and Gammon were sought out and solicited by Robnett personally to enter a timber claim. Robertson and Nelson went to see Robnett, as did Pierce and Hyde, the latter two being solicited to take up a claim by one Varney, whom Robnett paid \$15.00 for each prospective entryman he secured, and Ferris at the time Robnett solicited him to make an entry arranged with Robnett for George Ray Robinson to see Robnett about a claim for himself.

Robnett furnished every one of the entrymen composing his group the money with which to purchase their claims, and to a number of them he furnished the filing fee and incidental expenses. Ten of the entrymen forming this group were not sufficiently interested in the matter to go and look at the claim they were to enter, though some of them made an excursion in the direction of the timber to lend color of good faith to their entry.

Carrie D. Maris and Waldman were in the Lewiston National Bank, or in the directors' room of that institution, to see Robnett four or five times, relative to their entries before the same were perfected; John H. Long three times; Joel H. Benton, Hanson, Harrington, Bashor, Ferris, and Robinson twice; Robertson,

Nelson, Little, Francis M. Long, and Gammon once each.

Though Robnett advanced the entrymen composing his group the money with which to purchase their claims, he received the money furnished Little, Harrington, Pierce, Bashor, the three Longs, Morrison, Hyde, Ferris, and Robinson from Wm. F. Kettenbach, and the notes that the entrymen made at that time were given to Robnett and in his name, but they were assigned to Wm. F. Kettenbach without recourse, and the mortgages were recorded at the request of Wm. F. Kettenbach three, four, or five days later in each instance; and Robnett's testimony to the effect that he received the money for eleven of this group from Kettenbach is corroborated by Kettenbach (p. 3493). Kettenbach testified that the notes were endorsed to him without recourse at his suggestion, because "I didn't consider that I wanted to hold or would hold Robnett as security for the notes, as I considered that the *security was in the claims themselves*, and I had him assign each note without recourse, so that he would not feel that he was liable in any way on it, and in this State the assignment of a note carries the assignment of the mortgage" (p. 3479).

In connection with these notes the court, commenting upon the Long entries and the mortgages they gave, each amounting to \$728.50 and one for \$710.00, said: "It is not entirely clear just what entered in the transaction to make up these several amounts. It required approximately \$400 to cover the purchase price of a claim, and Robnett was paid a location fee, and in addition to that apparently there was a *bonus* and it

is not *improbable* that the entrymen were required to give the note and mortgage for a sum considerably in excess of the money they actually procured. Whether this went to *Robnett* or to Kettenbach, or was divided up between them, or just how it did figure in the transaction, is perhaps not of vital importance" (p. 310); and again in commenting on the entries of Ferris and Robinson, all five of which are part of the Robnett group, the court said: "In each one of these cases, also, it appears that the mortgage that was given covered a *bonus of about \$200*, part of which at least it is not improbable accrued to the benefit of Robnett * * * " (pp. 323-324). The record shows that the money used by the defendants in their timber transactions was the money of the Lewiston National Bank.

The district judge has forgotten that Kettenbach, testifying at a former trial before him relative to the same notes and mortgages, said that the money advanced on said notes belonged to his relatives; that he charged a bonus because of the *poor security* and that his relatives got the bonus.

Kettenbach's testimony is as follows:

Q. Mr. Kettenbach, will you tell us all that you remember of the transaction of taking up these notes for Mr. Robnett?

A. * * * I told him I would make the loans for my folks on the same conditions that Thatcher had promised to make them. I didn't feel that I should do it for any less than what Thatcher would have done it for, and in view of the fact I was *handling my people's money*, and had been very careful to get gilt-edge securities, and *I didn't think this one at the time*, I thought

I was entitled to have my folks get the *commission* which Thatcher was to have. So I agreed with Robnett that I would take these loans for my folks, and I took them and distributed them up among my people, *and my people got the commission. I got none* of the commission out of the loan (pp. 1860–1861; Kettenbach et al. vs. U. S., No. 1605, this court).

* * * * *

(Cross examination:

Q. You transacted all this business for your relatives, didn't you?

A. In regard to these nine mortgages?

Q. In regard to these questions you refer to?

A. Yes, sir (pp. 1876–1877; case No. 1605 this court).

* * * * *

Q. You want us to understand the transaction of the nine mortgages, all on behalf of some relatives of yours?

A. Yes, sir. I was handling their money.

Q. And you didn't ever make anything out of it yourself?

A. I made nothing out of the transactions except——

Q. Take that note of \$728.50 with interest at the rate of one per cent per month; they got all the note calls for?

A. They got all the note calls for.

Q. And you got the land?

A. Yes, sir; I got the land (p. 1877, case No. 1605, this court).

* * * * *

Q. You would not have accepted those loans from Mr. Robnett, considering the security was

so poor, if it had not contained a bonus of \$200, would you?

A. I probably would not.

* * * * *

Q. In other words, the great risk incident to the loan, the timber land, by reason of liability to fire, justified this bonus of \$200?

A. I think so.

* * * * *

Q. You would not have taken the loan if the bonus of \$200 was not in there?

A. No; not unless I had the note indorsed by good indorsers or had special security (p. 1883, case No. 1605, this court).

This would tend to impeach the credibility of Kettenbach and also to indicate that the deduction of the court that Robnett got the bonus was unfounded.

The note given Robnett by Robertson for the money Robnett furnished was assigned to the Lewiston National Bank at the instance of Kester, and later Robertson conveyed his claim to the Lewiston National Bank in consideration of the cancellation of the note, he thereby losing his filing fees, etc.

The money to purchase a claim was furnished Nelson by Robnett, but the mortgage to secure the same was recorded by Kester and the property was deeded to Thatcher, and Nelson received \$60.00. Thatcher acquired title while the present cases were pending.

The two Benton claims, the Waldman, and the Gammon claims were conveyed to Robnett. The Hanson, Little, Harrington, Pierce, Bashor, three Longs, Ferris, and Robinson claims were conveyed to Wm. F. Kettenbach; the Morrison and Hyde claims to Kester and Kettenbach.

Nelson received \$60.00; Hanson, \$60.00; Waldman, \$150.00; Little, \$30.00; Harrington, \$299.60; Bashor, \$30.00; Francis M. Long, \$25.00; John H. Long, \$27.50; Benjamin F. Long does not know whether he received \$25.00 or not; Morrison, \$200.00; Hyde, \$200.00; Ferris, nothing; and Robinson, \$72.25 above the amount of the note and interest for their claims.

Little saw Kester hand Robnett the money with which he purchased his claim; but the note given was assigned to Kettenbach, and Kettenbach testified that he furnished the money for Little.

From the opinion it will be observed that the court was inclined to hold the Joel H. Benton entry for cancellation were it not for the rights of the Clearwater Timber Company, which it found to be an innocent purchaser; that the Maris entry was made in accordance with an agreement between the entry woman and Robnett, but that Kester and Kettenbach were innocent purchasers (pp. 305, 308); that the Waldman entry was invalid and that the Lewiston National Bank took the same with knowledge of such invalidity; that the evidence was insufficient in the William B. Benton entry, because Benton had denied Robnett's version of the transaction; that Robnett's testimony was in conflict with that of the entryman, Nelson, who denied a prior agreement, and therefore the Nelson entry should also be held to be valid. The court was inclined to think that the Gammon entry was initiated upon agreement between the entryman and Robnett, but was led to the conclusion that the Lewiston National Bank acquired title to that claim, and also to the Van V. Robertson entry as an innocent purchaser, because it was

unwilling to believe that Kester, who negotiated the transfers to the bank, would violate his trust to that institution, whose interests it was his duty to protect (p. 303).

A reading of the testimony of Nelson and the testimony of the entrymen whom W. B. Benton located will indicate clearly that their testimony relative to their entries is entitled to no more weight than that given by Robnett in the same matter.

In holding the Gammon entry to be unlawfully made, the court said: "I am inclined to think that at the time the entry was initiated there existed between him and Robnett an unlawful understanding as to what disposition should be made of the claim when title was received" (pp. 304, 305); and in canceling the patent of the Wilson entry, the court said: "I am satisfied from the testimony of the entryman, reluctantly given, that, while there was no express agreement, there was a perfect understanding between him and the defendant *Dwyer, acting as the agent for Kester and Kettenbach*, that all expenses incident to the acquisition of title should be paid by Dwyer, and that the entryman was to receive \$150, in consideration of which he was, upon acquiring title, to convey the same to Kester and Kettenbach" (p. 286); and again, relative to the Steffey group of entries, the court said: "Though each one of them (the entrymen) while on the witness stand, categorically denied the existence of any agreement or understanding with Steffey prior to the initiation of the entry as to the disposition of the title, I am convinced by the circumstances of the case and the admitted conduct of the parties that they all made the entries with

the understanding both upon their part and upon the part of Steffey that, upon the issuance of final certificate for a definite consideration, they should convey the land to any one whom Steffey might designate * * * It is not improbable that some of them at least, by reason of the fact that the actual understanding with Steffey was not fully expressed, but was in a large measure left to interference, were led into evading, without fully appreciating that they were violating the law" (pp. 351, 352).

Were the same observations and the same measure of evidence applied in all of the entries forming the Robnett Group it would be impossible to escape the conclusion that said entries were made in fraud of the timber and stone law.

On the whole, it is clear from the testimony of the entrymen forming the Robnett Group that they did enter the claims on speculation and not in good faith to appropriate them to their own exclusive use and benefit, and also that the entries were made under an agreement or understanding with Robnett made prior to entries that the title which they might acquire from the Government should inure to Robnett, or to whomsoever he might direct.

Robnett testified that he never located anyone unless he had the right to sell the claim, or upon an agreement made before entry that the claim would be conveyed to whomsoever he would suggest. That was Robnett's understanding of what the entrymen with whom he was dealing would do with their claims, and the testimony of the entrymen, supplemented by what they did do in connection with their entries, is

conclusive that their understanding, so far as their transactions with Robnett were concerned, accorded with his views in the matter.

From the beginning to the end these entrymen acted under Robnett's direction.

Besides the testimony of Robnett as to his combination with Kester and Kettenbach, and the facts and circumstances already related corroborative thereof as we pursue the scheme and conduct of the defendants step by step in their acquisition of timber land, other matters will be mentioned later in their proper connection in the chain that will further fortify Robnett's statement of the relations that existed between them, not only prior to and at the time of the making of the entries in the Robnett Group, but through the entire period covered by the acquisition of the Kester, Kettenbach, and Dwyer timber lands.

THE EMORY AND COLBY GROUP.

During the period the "Robnett group" of entries were making, what are known as the "Emory and Colby group" of entries were initiated. The entries that form this latter group are the Evans, Bishop, and Clute entries filed March 24, 1903; the Newman entry filed March 25, 1903; and the Dent and Smith entries filed April 2, 1903.

Robnett in reciting the transactions relative to the Emory and Colby groups stated that, in the spring or summer of 1903, Colby came out of W. F. Kettenbach's private office at the bank and addressing Kester at the latter's desk said that during the preceding winter Emory had cruised a number of timber claims in 39-3

and that spring had located six men, who were working for them in the timber upon said claims (pp. 2273-2275) and gave the names of Evans, Bishop, Clute, Smith, Dent of the entrymen, but he could not remember the names of the other entrymen (p. 2279); that they had arranged with said entrymen prior to making their applications to file (p. 2278); that they were to furnish said entrymen with the money and all the expenses to make proof and to pay them \$200 each for their right and they were to convey their claims to Emory and Colby; that they (Emory and Colby) had been unable to get the money, and said "if Mr. Kester and Kettenbach went in and took care of the entrymen under the same conditions and terms that they had with them, that they would deed the claims over to them after proof and they were to receive \$200 per claim" (pp. 2273-2274). Kester told Colby that he would take the matter up with Kettenbach. Later when Kettenbach came to the bank Kester related to him the story that Colby had told him and it was agreed between them that they would take the matter up with Dwyer and also have Emory come in the next day and tell what he knew about the claims (pp. 2276-2277). The next day Colby and Emory came to the bank and Kester told Colby that they would furnish the money for proof and take the claims under the same conditions that they had with the entrymen and pay each of the entrymen \$200 for his right (p. 2277). On the day the entrymen made proof Colby came to the bank and talked with Kester in Kettenbach's private office. Kester directed Robnett to bring to him \$2,400 in currency and to make a cash item for the money, which

he did (pp. 2277-2278). At that time Evans and another of the entrymen were standing just outside of the bank on the sidewalk (p. 2279).

From the testimony of Emory is taken the following:

In the spring of 1903 Joseph B. Clute, James C. Evans, Lon E. Bishop, Frederick W. Newman, Charles Dent, and Charles Smith made timber and stone entries in Twp. 39 N., R. 3 E., B. M. These six entries were known as the Emory & Colby entries. All of them but Dent had worked in the woods for about fifteen years for Emory, who was at that time engaged in locating people on timber (pp. 3116 to 3119). These entrymen were located by Emory, and prior to the time they made application to file Emory had instructed his bookkeeper, Colby, to make an effort to obtain the money for the entrymen with which to make proof (pp. 3082, 3092). Colby testified "and I think Mr. Emory spoke to me about money, before they were located, saying they hadn't the funds to prove up with" (p. 3083). Colby saw Wm. F. Kettenbach at the bank and asked him to lend the money for the six entrymen to make proof. Kettenbach requested Colby to have Emory see him as to the value of the claims and the amount of timber on them, and Kettenbach asked Emory when he went to the bank to discuss the matter with Kettenbach whether a loan of \$400 on each of said claims was safe. Shortly after he left Kettenbach, Colby saw Kettenbach, who told him that he would advance the money for the six entrymen to make proof (pp. 3084, 3094 to 3496, 3119, 3128). Colby left the bank and advised Emory and the entrymen in waiting that Kettenbach would lend the money for

proof (p. 3084). Colby went to the bank and got the money and gave each entryman \$420.00 (p. 3093). With this money the entrymen went directly to the land office and made proof. While the entrymen were making proof Colby arranged with Lawyer Barnett, whose office was close by the Lewiston National Bank and the land office, to prepare the mortgages. He waited outside of Barnett's office for the entrymen to return. Colby said Emory and the entrymen joined him and that Emory informed him that the entrymen had decided to sell and not make mortgages. That afternoon four of them conveyed their claims to Kester and Kettenbach, and several days later the other two conveyed to Kester and Kettenbach, the latter two not having made their final proof until several days later than the others, each, however, conveying to Kester and Kettenbach their claims later on the day on which they made proof and receiving a small amount over and above what the claims cost (pp. 3085 to 3097, 3130). Colby settled with the entrymen in front of the bank, Emory being present (pp. 3101-3102). Emory was a witness at final proof for Dent, Newman, and Smith, and though he assisted in securing for them the entire amount of money with which they made proof, he swore at the land office a few moments later that of his personal knowledge they each had sufficient money of their own to pay for the land and to hold it six months without mortgaging it (pp. 3129 to 3138).

THE CLUTE AND EVANS ENTRIES.

Clute and Evans could not be found at the time of taking testimony in these causes. They both made

application to enter timber claims March 24, 1903. They made proof June 17, 1903, and on the same day each conveyed his claim to Kester and Kettenbach. The receipt of the receiver given each of them at the time they made proof, together with the deeds, were recorded at the request of Kester in August, 1903 (pp. 1425, 1426, 1633). At final proof Clute swore at the land office that the money with which he had purchased the land he had worked for and that he had had the same in his actual possession for two months (p. 3888), and Evans on the same occasion said that he earned some of the money with which he made proof by lumbering and that he borrowed the balance (p. 3913).

THE BISHOP ENTRY.

Lon E. Bishop entered a timber claim March 24, 1903. Emory located him, and nothing was said about a location fee (p. 2976). He and James Evans came to Lewiston together and Bishop filed. Emory directed him to go to Krutinger's office, where he had his filing papers prepared (p. 2978). Evans also accompanied him to Lewiston at the time of making proof. When Bishop started from home the morning he was to make proof he did not have the money with which to purchase the land, nor did he have an idea what the value of the timber was (p. 2979). Colby gave him between \$400.00 and \$450.00 with which to make proof. He left Colby and went immediately to the land office and made proof with the money Colby had given him (pp. 2981, 2983). Conveyed the claim the day he made proof to Kester and Kettenbach. Kester paid him the money at the Lewiston National Bank,

and he cleared about \$150.00 on the claim (pp. 2984-2985). He did not pay for the preparation of the deed, nor does he know who gave the one that drew the deed the description of the property (pp. 2987-2988). In answer to the question as to whether he expected to pay for the land with his own money and how long he had had the same in his actual possession, he swore at the land office that he earned all but \$150.00, and that he borrowed (p. 4062). Bishop made proof and purchased the claim June 17, 1903. On the same day he executed a deed to Kester and Kettenbach, which deed was in August, 1903, recorded at the request of Kester. Receiver's receipt recorded at the request of Kester at the same time (p. 2989).

THE NEWMAN ENTRY.

Frederick W. Newman made a timber and stone entry March 25, 1903 (p. 692). At that time he was employed at a warehouse owned by F. W. Kettenbach; salary, \$70 or \$75 a month (p. 672). Emory suggested that he take up a timber claim. Newman told him he would give him an answer in a few days, as he wanted to see the cashier of the Idaho Trust Company with a view of borrowing the money for that purpose from him. F. W. Kettenbach was at that time president of the Idaho Trust Company (pp. 674 to 677). Emory accompanied him to the lawyer's office when he had his papers prepared, and also went with him to the land office when he filed (pp. 681-682). He paid over \$400.00 in the land office when he made proof (p. 683). Colby gave him the money in the hallway at the land office. Emory told him that Colby

would bring him the money to the land office. Newman waited in the hallway at the land office until Colby came, and the latter asked him how much he wanted. Newman told him that he had ninety-odd dollars and didn't know how much would be required. Colby said, "I am in a hurry. Here it is" (p. 686). Colby said, "You pay what it costs you at the land office and if there is anything left hand it to Fred Emory." He then went into the land office with Emory and made proof (pp. 687-688). Bishop and Evans were at the land office at the same time. They all left the land office together, and Newman went to the Idaho Trust Bldg. to fire his furnace, where he was at that time employed as a janitor. Made proof in the afternoon and conveyed the title to the claim to Kester and Kettenbach the same afternoon. Emory paid him \$200.00 when he deeded the claim (pp. 689 to 691). He made \$20.00 out of the claim (p. 699). In his testimony at final proof Newman swore before the land office that the money with which he made proof was his own, and that he had earned part of it and borrowed part. Newman made proof June 17, 1903. The deed to Kester and Kettenbach bears the same date and it was recorded at the request of Kester August 10, 1903 (pp. 693-694).

THE DENT ENTRY.

Charles Dent made a timber filing April 2, 1903. He is sixty-three years of age, and has lived on the north fork of the Clearwater River for twenty-four years. Emory was locating people on timber in that vicinity, and asked Dent if he had ever taken up a claim. Dent

said "no," that he didn't know that he had much use for one, as he couldn't sell it. "Oh, yes, he said, I could sell a claim most any time," so I concluded I would take one. I told him if I could get \$100.00 for the claim I wouldn't mind taking one. "Well," he says, "you can easy enough get \$100.00" (pp. 716-719). Dent didn't have the money to purchase the claim when he had that conversation with Emory. Emory located him and nothing was said about a location fee and he never paid one (p. 719). "Q. Do you remember whether or not in that affidavit you made this statement: I talked to Mr. Emory before I made my entry. Mr. Emory came to my place and asked me what I would take for my right, I told him \$100.00, the amount I did receive? A. I told him I would take \$100.00, yes. Q. And you got \$100.00? A. Yes, I got \$100.00" (p. 722). When he came to Lewiston to file he met Fred Emory. Does not know what it cost to file or to make final proof on the claim (pp. 722-723). Emory advised him of the time to make proof. Did not arrange for the proof money before he left for Lewiston. Met Colby on the street and asked him to lend him some money, which the latter did. "Q. How much did you ask him to loan you? A. I think it was \$100.00" (pp. 726-727). Dent didn't care whether he made proof on the claim or not. "Q. Now, do you remember that you had \$400.00 which you paid at the land office when you made your proof? A. \$400.00? Q. Yes, sir. A. No, I didn't have \$400.00. Q. Well, you must have, or somebody had it, because you paid \$400.00 for the land in the land office. A. Well, of course, I must have had it if that is what it is." Colby

gave Dent the proof money on the street and then accompanied him to the land office (pp. 728-729). Emory and Charles Smith were at the land office at the time Dent made proof. Dent, Emory, and Smith left the land office together and met Colby, and Dent sold his claim through the latter and executed a deed for it within an hour after making proof. Colby gave him \$100.00 (pp. 729-730). "Q. Do you know that you made the deed to Kester and Kettenbach? A. I don't know, I didn't read the deed" (p. 730). Dent said "I talked to Mr. Emory when he was at my place of business where I could get the money and he told me he could let me have the money, so I didn't pay any more attention to it." The transaction turned out just as Dent understood that it would from the start. Dent had no recollection of spending any money of his own for the expenses of taking up this timber claim. He understood from the first talk he had with Emory he would get \$100.00 out of it and he wouldn't have taken it up if he hadn't been told that (p. 731). At final proof Dent testified that the money with which he purchased the land he had earned part of, and had borrowed the balance (p. 3834). Dent made proof June 23, 1903, and receiver's receipt was issued to him at the same time. On the same date he executed a deed to Kester and Kettenbach conveying title to his claim and the same was recorded at the request of Kester August 10, 1903 (p. 732).

THE SMITH ENTRY.

Charles Smith made a timberland filing April 2, 1903 (p. 2999). He was at that time employed by Fred

Emory, and when he was working in the woods he was paid \$40.00 a month (p. 2995). He and Joseph B. Clute asked Emory to locate them on a timber claim and they didn't have the money with which to purchase a claim, and they advised Emory to that effect and Emory said he would "back them up." This was before they filed on the claim. Smith and Clute were together when the conversation relative to locating on the claims was had with Emory, and Smith and Clute both came down to file at the same time (pp. 2995 to 2999). Smith received the money with which to make proof from Emory. Emory and Dent accompanied him to the land office when he made proof (pp. 3004-3005). His best recollection is that Emory gave him the \$412.00 that he paid into the land office when he made proof. Is not sure, however, and it might have been Colby. Smith and Clute talked over the matter of selling the claims together and they negotiated the sale through Emory the day they made proof and immediately afterwards (pp. 3007 to 3010). Smith and Clute went to an office together and had the deeds prepared (pp. 3010-3011). Smith got \$600.00 for the claim, and after he returned the money that had been advanced to him he had very little left (pp. 3013 to 3015). At final proof Smith testified that the money with which he paid for the land he had earned most of and had borrowed \$200.00 (p. 4065). Smith made proof June 23, 1903 (p. 2999). Receiver's receipt and the deed conveying title to his claim to Kester and Kettenbach are dated the same day and recorded at the request of Kester August 10, 1903 (pp. 1510-1511).

SUMMARY OF EVIDENCE CONCERNING EMORY AND COLBY GROUP.

Notwithstanding the fact that the six entrymen conveyed their claim to Kester and Kettenbach on the same day on which they made proof, and none of whom received as much as \$200.00 above what his claim had cost, in making proof, several hours before, Bishop swore that his claim was worth \$1,000 (p. 4061); Clute swore that his was worth \$1,500 (p. 3887); Dent testified that his was worth \$2,000 (p. 3834); Evans stated that his claim was worth \$1,200 (p. 2913); Newman swore that his was worth \$1,000; and Smith swore that his was worth between \$2,000 and \$2,500 (p. 4064).

Though Robnett's recital of the conversations and arrangements that took place in the Lewiston National Bank between Colby and Kester relative to this group of entries, showing that the entries were made pursuant to an agreement between the entrymen and Emory, the entrymen to be furnished the money with which to take up and purchase the claims and to pay the stipulated price for them after proof, and that this arrangement was detailed to Kester and he had agreed to take over and complete the agreement on the same terms, is denied by those stated to have had the conversations; Robnett's testimony is corroborated in part by the testimony of Kester, Kettenbach, Emory, and Colby, witnesses for the defense, and the portions of his testimony that are contradicted by said persons are strongly supported by the contemporaneous facts and circumstances, and a reading of the testimony of the entrymen—Bishop (beginning p. 2976 of record), Newman (p. 671 of record), Dent (p. 716 of record), and

Smith (p. 2995 of record), seems to us to be conclusive that all of the entries of this group were made pursuant to an antecedent agreement with Emory that the entrymen, in consideration of his furnishing them the money with which to enter and perfect their entries, would after proof convey the same as Emory directed for an amount certain.

Dent's testimony is especially significant in this respect. He was sought out by Emory and solicited to make an entry, Emory telling him he could make \$100.00. He paid no location fee, and the money was furnished him with which to purchase the land, but he does not remember the amount, and he conveyed to Kester and Kettenbach within an hour after making proof and received the promised \$100.00.

A great part of the conversation related by Robnett is also told by Colby in his testimony, but Colby, Kester, and Kettenbach deny that a prior agreement with the entrymen was spoken of; Colby also testifies, as does Kettenbach, that the conversations were had with Kettenbach and not with Kester. This is merely another form of an attempted impeachment of Robnett in like character to that where the testimony of Robnett and the evidence of Lambdin point to the conclusion that Kester tried to induce Hutchings to make an entry for their benefit, and Kettenbach testifies that it was he who had the conversation with Hutchings.

So fearful was counsel for the defense that Colby in his testimony might have corroborated Robnett in this regard counsel invited the following colloquy:

Mr. TANNAHILL:

Q. I will ask you, Mr. Colby, if at this first conversation which took place between you—well, I will ask you who you first talked to about these transactions? I understood you to say Mr. Kester. Is that right?

A. You mean who of the defendants?

Q. Yes.

A. Mr. Kettenbach. Did I say Kester? I never talked with Kester about it at all (pp. 3086–3087).

And again in the testimony of Mr. Emory, who testified on behalf of the defense in referring to his inability to get the money for the entrymen to make proof from a Mr. Skinner, said:

* * * And so I told him to see other parties, and he told me he would, and one day he said he was talking with Mr. Kester, I think, in regard to it——

Q. Mr. Kester, or Mr. Kettenbach?

A. I wouldn't be sure whether it was Kester and Kettenbach or Mr. Kettenbach * * * (p. 3119).

Before the entrymen had applied to make their filing Emory evidently knew that the entrymen did not have the money with which to purchase the land and had agreed to furnish it for them, as Mr. Colby, testifying said:

* * * Mr. Emory had been engaged in locating parties on timber, had made a business of it, and finally located them on timber, *and I think Mr. Emory spoke to me about money matters before they were located, saying that they hadn't the funds to prove up with, and asked me*

my opinion as to whether there would be any trouble in getting a loan to prove up with, and I told him I thought not, if they got good claims (p. 3083).

Robnett testified that on the day the entrymen made proof Colby came to the bank and talked with Kester in Kettenbach's private office, and that Kester directed him (Robnett) to bring to him \$2,400.00 in currency and to make a cash item for the money, which he did (p. 2278).

If Robnett did not hear the conversation he related and did not take out of the cash of the bank the amount of money he states at the direction of Kester and give it to him and put in the place thereof a cash item, the money that was used for this purpose on that occasion would have been charged in the regular way to the account of Kettenbach in the ledger of the bank.

Colby testified as follows:

Q. And how much money did you get from Mr. Kettenbach for these gentlemen to make their proof?

A. I think I handed them \$420.00.

Q. Apiece?

A. Yes, sir.

Q. How much money did you get from Mr. Kettenbach?

A. I got all of it from him.

Q. Twenty-five hundred and some odd dollars, wasn't it?

A. I don't know; there was six of them.

Q. Well, six times four hundred and twenty is 2520. Is that the amount you got from Mr. Kettenbach?

A. Yes, sir; I guess it must be. I didn't get it all at once, though. Mr. Robnett there seems to have stated that he brought in \$2,500.00. It didn't all come in at once (p. 3093).

As to this matter Mr. Kettenbach testified:

I know that Mr. Colby got the money, and, I am not certain, but I think, I just told him to draw his check for just the amount that he would need, and to attend to the whole matter. I know I was busy with something else, and I had perfect confidence in Mr. Colby, I had known him for a long time, and I think I told him to attend to the whole matter, and attend to drawing up the mortgages and notes and everything, and to deliver them to me properly perfected (p. 3438).

At the date of the making of the final proof of these entries Colby had no account at the Lewiston National Bank (pp. 3685-3686), and if he had given a check in that amount it would necessarily have been taken care of as a cash item by Kester and Kettenbach, as were the O'Keefe checks, the Dwyer checks, and the Steffey checks, to be mentioned hereafter, and it was not a bank transaction, as, according to Kettenbach, mortgages were to be taken.

Thus, four of five of these entrymen were in the employ of Emory and Colby and were working at that time on the township upon which they entered; Dent was not employed by this firm regularly, but was sought by Emory and was not charged a location fee. None of them had the money with which to purchase the claim, and this was known to Emory and that intelligence conveyed to Colby before the entries were initiated.

Kettenbach, either for himself, or himself and Kester, furnished the money for the purchase of these claims, and the six claims were deeded to them the day proofs were made, within a few minutes or several hours thereafter. In no part of the transaction did the entrymen act independently, but were moved from place to place by Emory and Colby and did as they directed. Emory had been to the bank for the purpose of securing the money for the entrymen, and if the testimony of Kettenbach and Colby to the effect that they were to give notes and mortgages to secure the money furnished is to be credited, Emory knew it. Notwithstanding that fact, within a few minutes after the money was gotten from Kettenbach or Kester and delivered to the entrymen Emory accompanied the entrymen to the land office (which was in the Lewiston National Bank Building on the floor above the bank) (p.3005), appeared as a witness for three of said entrymen, and testified that they had sufficient money of their own to pay for this land and to hold it for six months without mortgaging it (pp. 3129-3138). Emory immediately after proof accosted Colby and stated that the entrymen desired to sell the claims.

THE CORNELL ENTRY.

The next entry made was that of Ivan R. Cornell, in which the initial papers were filed June 19, 1903. This entry was procured by Kester under a positive prior agreement that Cornell would make the entry, Kester to furnish all the necessary money for the purpose and Cornell to convey the title to his claim to Kester for \$100.00. The facts surrounding this claim are signifi-

cant as showing that Kester, Kettenbach, and Dwyer were still pursuing the same methods in procuring entrymen, to make entries under antecedent agreements, as they had with the first one they had procured, the Lambdin claim, in April, 1902, fourteen months prior thereto; Kester, Kettenbach, and Dwyer each performed an important function in the procuring and perfecting of this entry and of obtaining the title to the same. They also show the perfect understanding that Kester, Kettenbach, and Dwyer had among themselves in their concerted endeavor, and are further corroborative of Robnett's statements of their timber transactions and of the character and financial standing of the persons they were using as their tools.

As a boy years before, Cornell had gone to school with Kester at Portland. At the time of making his entry he was practically an indigent about the streets of Lewiston, and had no regular employment. Kester stopped him on the streets of Lewiston one day, and in the conversation which followed, Cornell told Kester that he was out of work, and asked him if he could secure him some employment. Several days later, Kester again met Cornell and told him that he was unable to find him any employment. Cornell stated that he was short of funds, and Kester "made him some little advance." Later Cornell went to the bank and Kester loaned him \$10.00 (pp. 3161-3162).

Dwyer testified Cornell was engaged in picking cherries for White Brothers (p. 3401).

Kettenbach testified that Cornell worked in his yard cutting grass, and also had worked in the yard of Frank Kettenbach, who lived next door (p. 3500).

Prior to filing, Cornell had been employed by both the register and the receiver of the land office splitting wood for them (p. 2817).

This is the man whom Kester followed to his lodging and induced to agree to enter a timber claim upon the conditions before stated, and the claim that Cornell entered was Dwyer's homestead (p. 3330).

The testimony of Cornell to the effect that after Kester and Dwyer had coached him as to how he should answer the questions to be propounded to him at the land office from a list of questions they had in their possession, the answers to which were written in lead pencil, which list, after that important function was performed, was given by Kester to Robnett, strengthens and corroborates the testimony of Robnett as to the confidential relations that existed between him and Kester and Kettenbach, and especially of their relations concerning timber matter.

Cornell's testimony is to the effect that every dollar he used in the transaction was furnished him either by Dwyer or Kester, even the twenty-five cents necessary for notarial fee incident to some step taken in the filing of the claim, and his testimony is entirely consistent on this point, as from his financial condition, which was known to Kester, Kettenbach, and Dwyer, he had nowhere else to get it.

Ivan R. Cornell, who made a timberland entry June 19, 1903, testified that he had known Kester a number of years, having gone to school with him as a boy at Portland. At the time he took up his timber claim was residing at Lewiston. He had no regular employment, but was doing odd jobs. One afternoon in June, 1903,

Kester followed him to his room and asked him if he had ever used his stone and timber right. Cornell replied in the negative (pp. 2801-2802). Kester told him he knew of a place where he could use his right and told him if he would file on the claim he had in mind he would pay all the expenses of going to look at the land and all the expenses in connection with the filing and furnish the purchase price at final proof, Cornell to deed the claim to him after he got title and Kester would pay him one hundred dollars. Kester told him that that would be stretching the law. Kester asked him if he would agree to take up the land under those conditions. Witness replied "I guess so." Kester told him to meet Dwyer at the railway station the next morning (pp. 2802-2803). Cornell did not even know where they were going, but met Dwyer at the ticket office where the latter bought two tickets. He had never talked to Dwyer about a timber claim and did not advise Dwyer what he was there for. The claim that he was shown by Dwyer, Dwyer stated was a homestead claim that was to be relinquished. Thinks Dwyer told him it was his own homestead. (Dwyer says it was his homestead. In going to the timber Dwyer remarked that the timber they passed through belonged to parties who were associated with him (pp. 2803 to 2812). Cornell did not pay any of the expenses of the excursion to the timber. The conversation with Kester was before he had even viewed the timber. The day after his return from the timber Cornell went to the Lewiston National Bank to meet Dwyer, having made an appointment with him for that time and place to receive the relinquishment. When Dwyer arrive Kester was at

luncheon. Shortly thereafter Kester and Kettenbach returned to the bank from luncheon and Kester, Kettenbach, and Dwyer went into Kettenbach's private office in the bank (pp. 2806-2807). After the conference between Kester, Kettenbach, and Dwyer, Dwyer came out of Kettenbach's office with the relinquishment for the homestead in his hand. He stated to Cornell that he was ready to go upstairs to the land office. At the time Dwyer gave Cornell \$8.00 for filing fees. Dwyer took him upstairs to the office of a lawyer by the name of Mullen to prepare the filing papers (p. 2809). Cornell did not know the names of witnesses that were necessary for final proof and Dwyer suggested Wm. F. Kettenbach and two others (p. 2811). Later Kester gave Cornell \$1.50 to pay Mullen for preparing the papers (p. 2812). Shortly thereafter Kester gave him \$0.25 and a blank paper to take to a notary public and have acknowledged. Thinks it was a second relinquishment. After the notary put his seal on it he returned to the bank with it and gave it to Kester. Kester asked him to sign it and have Robnett and Bradbury, a clerk in the bank, witness his signature. About a week before final proof Kester met him on the street and advised him of the time that proof was to be made (pp. 2815-2816). Before final proof Cornell discussed with Kester the answers he should make at the land office relative to where he had received the money to purchase the land. Prior to filing Cornell had worked for the register and receiver, splitting wood for them. Kester told him to come in the morning he was to make proof and he would go over the questions with him. In compliance with this agreement he went to

the bank and met Dwyer, who advised him that Kester was waiting to see him and he had better go in and talk with him. Kester had a set of final proof papers with the answers to the questions written in lead pencil; handed them to Dwyer and Dwyer and Cornell went into Kettenbach's private office (pp. 2817-2818). Kettenbach was in his office at that time. While they were going over these questions some person called to see Kettenbach and the latter suggested that Dwyer take Cornell into the directors' room. After going over the questions with Dwyer they went into the banking part of the building and Cornell gave the questions to Kester, telling him he was through with them, and Kester handed them to Robnett. Kester then figured up the amount of money it would cost to pay for the land and handed Cornell \$360.00 (his claim was for 138 acres) (pp. 2818-2819). Dwyer and Cornell returned to the directors' room, and then went upstairs to the land office. The money Kester had given him was to pay for the land. Shortly after they went to the land office Cornell went back into the bank and told Kettenbach that the receiver would be ready for him to testify in regard to Cornell's claim in about twenty minutes. At the taking of proof the receiver in observing the answer that Cornell had made that he was getting the money from his father remarked that it looked to a man up a tree like Dwyer had—or that he was going to deed the land back to Dwyer after making final proof, and Cornell told him "no." (pp. 2820-2821). Immediately upon leaving the land office and he had gotten to the street Dwyer stated that he had a deed for Cornell to convey the land to Kester and Kettenbach and asked

him to take it over to Otto Kettenbach and to acknowledge the deed before him (p. 2822). This was within ten minutes after he made proof. Cornell told him that before he executed the deed he wanted to see Kester. That evening Kester met him and asked him if he had executed a deed and said that he had better do it. Cornell repeated to Kester the remarks made by the register about there being a man around for the purpose of investigating that and other claims. Kester replied that that man was looking into timber trespass cases and that as to investigating violations of the timber laws, nothing of that kind would happen in Idaho (pp. 2822-2823), and if any such thing should occur that he, Kester, would be the man they would get after, and further remarked "You, Dwyer, and I are the only persons that know anything in regard to this agreement," and "if we all deny it how can any trouble come to us?" Kester asked him to come into the bank the next day. He wanted to change the date of the deed. Cornell again went to the bank and went into Kettenbach's private office with Kettenbach and there he changed the date of the deed (p. 2823). Kettenbach stated that he didn't intend to have the deed recorded for six months and that he would want another one later on and stated that he had already made arrangements to transfer the title (p. 2824). Kester also said that when that time came he would ask him to make another deed, which he did later and returned it to him. Acknowledged the deed before Otto Kettenbach. The second deed was made to Wm. F. Kettenbach and Geo. H. Kester. A day or two later Kester told him to come into the bank and he would pay him the money (pp. 2825-2826). The

next day he went to the bank and Kester paid him the money. The money was paid six or seven days after proof. Kester having loaned Cornell small sums of money, when the settlement was made, gave him \$85 or \$86. Part of it was paid in cash and for the balance he gave Cornell a certificate of deposit. The certificate was for \$55. Kester told the teller to give him the certificate of deposit (pp. 2826-2827). Thinks he made a second deed to Kester and Kettenbach September 29. When the second deed was made Kester returned the original deed to Cornell which he burned. In the summer of 1905 Cornell met Kester in the Imperial Hotel, Portland, Oreg. While in the hotel Kester came in and began talking to him about grand jury proceedings at Boise at which Cornell had testified in the previous July. Kester told him that he, Cornell, would have nothing to fear and that he would see him again. When Kester first talked with him about taking up a claim it was Cornell's understanding that he was to look at a claim with Dwyer, make application and after getting title from the Government to deed it to Kester and get \$100 (pp. 2827 to 2830). Exhibits offered on page 2831. Robnett testified that in the spring of 1903 Kester came into Kettenbach's office and stated that he had met an old schoolmate of his from Portland, that he had gone to school with him at Bishop Scott's Academy, that he seemed to be in hard straits and that he had spoken to him about taking up a timber claim and said "I spoke to him about taking up a timber claim and that we would give him \$100. He needs the money bad and think he is going to take the offer, and I think we can put him on the claim that Bill Dwyer is

holding as a homestead." Kettenbach asked Kester if he could depend upon Cornell (p. 2229). Kester replied—"Yes, I believe he will come through and sell his right for \$100." Kettenbach told Kester to see Dwyer about taking him to the land and that if everything was all right for him to go ahead. Robnett tells of a number of conversations had between Kester and Cornell at the bank (p. 2230). Cornell made proof September 10, 1903, and the deed conveying the claim to Kester and Kettenbach is dated September 29, 1903 (p. 2831).

THE HAEVERNICK ENTRIES.

The next two claims are those of Wm. Haevernicks and wife, entered in October, 1903, both of whom were in a company, together with Frank Kettenbach and two others, of which Frank Kettenbach was president, and whose claims were conveyed to Frank Kettenbach in some sort of a settlement that they had with him in the company. The testimony relative to them is reported on pp. 470 to 490 of the record.

The next entries in the suits were made April 25, 1904, when several additional townships were thrown open to entry to the public. It is in these townships that Kester, Kettenbach, and Dwyer gave full rein to their rapacious greed in the acquisition of Government timber lands. From the dates of the entries it would appear that for the period of ten months between the entry of the Cornell claim and those initiated April 25, 1904, the combination had remained inactive, while, in fact, their operations were more continuous, bold, and fruitful than any during their concert of action.

There was to be an opening of several new townships, well timbered, in the near future, no definite date for the opening being fixed, that time depending upon the date of the filing of the surveys by the Government, and, as provided by statute, the land to be opened to the public for entry sixty days after the filing of the plats of survey. Under such circumstances it was the habit of persons to squat upon quarter sections, pretending to select the same for a homestead, and in the event the State did not, in the exercise of its preference right of selection (which was sixty days after the plats of survey were filed), select these homesteads the persons who had located upon the unsurveyed land within said townships would be entitled to make a homestead filing upon the same, or, after having made such filing, change the same to a timber and stone filing, thus giving said squatter the advantage to make a timber and stone filing over all others.

On February 24, 1904, the plats of survey of twps. 39 N., Rs. 5 E. and 6 E., and 38 N., Rs. 5 E. and 6 E., and 40 N., R. 5 E., B. M., were filed in the land office at Lewiston, and these lands became subject to entry, according to law, April 24, 1904 (pp. 1551, 1552, 1553, 1556). These are the lands that were the object of the combination's special design.

Robnett testified that in May, 1902 (should be 1903), Kester told him that Dominick Cameron, a timber cruiser, had cruised out and surveyed about eighteen claims in one of said townships and that Kettenbach was going to take a couple of said claims and had his cousin Solomon Caldwell and one Low squatting

thereon, and suggested that he and Robnett also locate several of said claims and file on them when the same became open to entry; later the matter was thoroughly discussed between Kester, Kettenbach, and Robnett in the directors' room of the bank and it was arranged that Kester and Robnett should have cabins built on several of the claims and put one McGee upon the claims to hold them for them. Kester stated that they should build cabins before the surveyors came along and that he had it arranged with the man in charge that he would make a notation on the maps which would indicate their claims at the land office. If the State did not select the claims upon which they were to put squatters, they proposed to get some one to file homesteads upon them after the land became open to entry and later to relinquish said homesteads and file on the claims under the timber-land act. Later Kester, Robnett, and McGee went into the Pierce City country, each selected a claim and McGee was to build a cabin and hold the claims for them. For holding the land until the plats were filed McGee was to be paid \$100 and all his expenses (pp. 2211 to 2216).

At pages 3180 to 3186 portions of Robnett's testimony were read to Kester and he was asked whether or not such conversation was had, to which he answered no. He does not, however, deny that he, Robnett, and McGee went into the timber beyond Pierce City, or the arrangements which Robnett states was made with McGee; that the persons whom Robnett says were there were in fact there and corroborates Robnett's testimony in part as follows:

Answer by Kester:

Well, I think there was something about the McGee proposition; that is, I wanted to get one claim up there, and as I remember it the claim that Clarence wanted was near that one, and that McGee was to build a cabin, and do some improvements there, in the meantime—to make the required improvements for a squatter's claim; and that is all I remember about it (p. 3182).

Kettenbach does not deny the part of Robnett's statement to the effect, that he, Kettenbach, had a couple of persons holding claims for him in the Pierce country (p. 3455).

So in the spring of 1903, Kester and Kettenbach were making ready for the opening of the townships above mentioned, and in the fall, in October of that year, they made further preparation by having Dwyer take into those townships nineteen entrymen who later form the line up at the land office the day of the opening (April 25, 1904), composed of George H. Kester and his relatives; the kinsfolk of Wm. F. Kettenbach, the entrymen who were procured to make entries by Kester and Kettenbach and also the entrymen procured by O'Keefe, Kester's partner, and Dwyer. Also in said township are about sixteen entries that Dwyer contested, and these claims were acquired by Kester and Kettenbach through relatives of Kester, and entrymen procured by Dwyer to file upon them.

THE "LINE UP" AT THE LAND OFFICE.

As heretofore stated, said townships were not open to entry by the public until April 25, 1904 (pp. 1522,

1553-1556, 1551) and a week or ten days prior to that day persons* began to form in line at the door of the land office at Lewiston to await the day on which they could file on said claims, and on the morning of April 25, 1904, there were in line at the land office the following-named persons in the order in which they appear below:

1. Jackson O'Keefe (partner of Kester).
2. Charles W. Taylor (nephew of O'Keefe).
3. Joseph H. Prentice (employed by Kester and O'Keefe).
4. Edgar J. Taylor (nephew of O'Keefe).
5. Edgar H. Dammarell (brother-in-law of Prentice).
6. George H. Kester (defendant).
9. Guy L. Wilson (son-in-law of Mrs. Justice).
10. Edna P. Kester (wife of Kester).
11. Frances A. Justice (mother-in-law of Wilson).
12. Fred E. Justice (son of Mrs. Justice).
13. Elizabeth Kettenbach (aunt of Kettenbach).
14. Elizabeth White (mother-in-law of Kettenbach).
15. Wm. J. White (brother-in-law of Kettenbach).
16. Mamie P. White (sister-in-law of Kettenbach).
17. Martha E. Hallett (housekeeper for Kester).
18. Daniel W. Greenberg.
19. David S. Bingham (employed by Kester and O'Keefe).
24. Hattie Rowlan.
25. Wm. McMillan.

Each of the above-named persons were induced to make an entry either by the defendants Kester, Kettenbach, and Dwyer personally, or by one of their agents; and said entrymen made their entries in accordance

with a prior agreement or understanding that they would convey the title acquired to the defendants or as they should direct; and the entrymen did convey the claims so entered to Kester and Kettenbach or to Kittie E. Dwyer, except Martha E. Hallett and the kinsfolk of Kester and Kettenbach who still hold the titles to the entries made by them for the benefit of said defendants.

We will refer to the evidence concerning the nineteen entries forming the line-up; and the contests, seriatim and in sequence.

THE O'KEEFE GROUP.

The entrymen forming the O'Keefe group are Jackson O'Keefe, Charles W. Taylor, Joseph H. Prentice, Edgar J. Taylor, Edgar H. Dammarell and David S. Bingham. They each made an entry April 25, 1904, and held places in the line Nos. 1, 2, 3, 4, 5, and 19, respectively.

Robnett testified in regard to the entries of J. O'Keefe, David S. Bingham, Charles W. Taylor, Edgar J. Taylor, Joseph H. Prentice and Edgar H. Dammarell, which were spoken of as the "O'Keefe entries" that he knew Jackson O'Keefe in his lifetime and was present at a number of conversations that took place at the Lewiston National Bank between Kester and O'Keefe, and Kester, Kettenbach, and O'Keefe (pp. 2235-2236); that in the fall of 1903 or the spring of 1904 he heard a conversation between Kester, Kettenbach, and O'Keefe in the bank in which these entrymen were named as being some that O'Keefe could secure to file on timber claims at from \$150.00 to \$200.00 each; that O'Keefe was then authorized by Kester and Kettenbach to pay

all the expenses of said persons in connection with the claims by drawing checks on the bank and keeping a memorandum of it (pp. 2239-2240); that there were several different conversations between said parties in regard to these claims which were always mentioned as the "O'Keefe claims" (p. 2241); that prior to the time final proof was made on said claims O'Keefe was in the Lewiston National Bank and was told by Kester that when the claims were ready for proof that O'Keefe should come over to the bank and get the money and give it to the entrymen, then take them up to the land office and afterwards look after the transfer of the titles; that O'Keefe did get the money at the bank for the entrymen to make proof and gave checks for the amount, which were held in the bank as cash items and then taken up by Kester and Kettenbach; that Kester and O'Keefe were interested in an irrigation project at Cloverland, Wash., being joint owners of the same (p. 2242); that at different times the six claims were deeded to Kester and Kettenbach and were paid for by them (p. 2243), that Robnett was a bookkeeper in the Lewiston National Bank at that time and he worked on the depositors' ledger; he also worked at the window adding up the cash items, etc., and had charge of the different books in which these different accounts were run, "So I knew how the transactions was entered there and also the Asotin Land & Irrigation Company, there was some of these items went there, and afterwards they were taken up and settled by credits in disposing of it" (p. 2244) and finally all cash items of O'Keefe were taken up by Kester and Kettenbach (p. 2244); that at the time of the line up at the land

office April 25, 1904, the defendants had about 18 entrymen in line in which the O'Keefe claims were included (p. 2253); that the location fees of the O'Keefe entrymen were paid with a new \$100 bill which was the property of the Lewiston National Bank, being handed about from one entryman to the other and returned to the bank in the evening (p. 2280).

THE CHARLES W. TAYLOR ENTRY.

Charles W. Taylor, who was in the line-up and made an entry April 25, 1904, testified that he has resided at Asotin, Washington, for fifteen years. He is a nephew of Jackson O'Keefe and brother of Edgar J. Taylor. O'Keefe and Kester were in partnership in the irrigation business in the fall of 1903 and the spring of 1904 (pp. 1058-1059). Jackson O'Keefe spoke to Taylor about taking up this claim in the fall before he filed. He, O'Keefe, said he was going to take one and wanted Taylor to go with him and enter one, too (p. 1060). O'Keefe asked him to talk to his brother, Edgar J. Taylor, and Joseph H. Prentice and Edward Dammarell with a view of inducing them to take up claims also. The proposition of O'Keefe was that he would furnish the expenses for the entrymen and the money with which to purchase the claims. Taylor at that time was working for O'Keefe and Kester. That was the first conversation that Taylor had with O'Keefe about timber claims. O'Keefe was to furnish the money to take up the claim and then was to give Taylor \$150.00 over and above all expenses for the claim (pp. 1061-1062). O'Keefe told Taylor to tell Prentice and Dammarell and his brother that he would make the same

agreement with them. Taylor said he saw them and repeated what O'Keefe had said. When they started for the timber O'Keefe told Taylor that George Kester and some more of them were taking up claims (p. 1062); that George Kester was going in there with a crowd to take up claims. Taylor agreed with O'Keefe to take a timber claim up in compliance with said arrangements. The agreement was made two or three weeks before they started to view the timber. Those who went with Taylor to the timber were O'Keefe, Edgar J. Taylor, Prentice, and Dammarell (p. 1063). Taylor went to Lewiston and met O'Keefe at the depot and from there they went to Orofino. O'Keefe paid the expenses of the trip. From Orofino two of the party went on horseback and the rest in a hack to Pierce City, about 30 miles, and then 7 or 8 miles beyond Pierce (p. 1064). They were away from Lewiston two or three days, and Taylor paid no expenses whatever on the trip. He then returned to Asotin and did not file for several months (p. 1065). Wm. Dwyer went over the claim with him. He had no arrangements with Dwyer about paying a location fee. O'Keefe advised Taylor when to go to Lewiston and make his filing. Taylor stood in line at the land office for almost a week before he filed (p. 1066). O'Keefe brought him his sworn statement and other papers while he was in line waiting to get into the land office. O'Keefe also gave him the money to pay the filing fee at the land office (p. 1067). When Taylor went to Lewiston to make final proof two months later the same persons came with him that had been with him all the time—Prentice, Dammarell, and his brother. He saw O'Keefe on that occasion

and paid \$400 into the land office at that time, which Mr. O'Keefe gave him. Taylor had not asked him for the money (p. 1068). "Q. Now, did I ask you what you were to do with this land, in your first conversation with Mr. O'Keefe, what you were to do with this land to make that \$150.00?—A. I was to sell it to him." Later O'Keefe told Taylor he couldn't do what he had agreed to do. He said that he and Mr. Kester were taking up this land, and that Taylor was to convey to him to get the \$150 (p. 1069). Taylor was to sell the claim to him after he got the patent for it. That arrangement was made before Taylor went to see the land, but O'Keefe changed that and said he couldn't do that (p. 1070), and that said George Kester had advised him that it couldn't be done that way, but he went right on and took up the timber and intended to convey it to him just the same. "He thinks O'Keefe said that George told him he couldn't make no agreement of that kind or something to that effect" (pp. 1070–1071). At final proof Taylor testified that the money with which he purchased the land he had earned part and borrowed the balance and had had the same in his possession two weeks (p. 1072). This answer was not true, and O'Keefe told him to answer the question that way. He got a receipt from the land office the day he proved up, and either the next day or the second day after he turned it over to O'Keefe. Afterwards, when Inspectors O'Kallon and Goodwin came around, O'Keefe returned it to Taylor and told him to keep it until that thing was settled. He said it would look as though Taylor still owned the claim. Taylor had already conveyed the claim. O'Keefe told him to tell the inspec-

tors that he had his receipt, and the claim was his (pp. 1072-1073). At the time Taylor made the deed O'Keefe said he wouldn't record it until the patent was issued. Taylor made the deed two days after he made proof and got the \$150 at that time (p. 1074). The deed was drawn and signed at Asotin. Taylor said he just went down there and made the deed and O'Keefe gave him \$150.00. There wasn't any dickering about the price or anything of that kind. O'Keefe told them either on the road to the timber or when they returned from the timber that they would have to pay \$100 location fee. Taylor paid the location fee to Wm. Dwyer the day he made proof. He got the money from O'Keefe for that purpose (p. 1075). O'Keefe handed him \$100 and told him to pay that to the locator. It was a new \$100 bill, and he gave that to Dwyer (p. 1076). He proceeded in the matter of taking up this claim and disposing of it according to the understanding and agreement he had with O'Keefe the first time he talked with him about the claim and after the second statement made by O'Keefe that he couldn't make an agreement there was nothing more said about it (p. 1078). The first conversation Taylor had with O'Keefe, he said that he and Kester were going into the timber and take timber (p. 1081). O'Keefe said that he and Kester were in together; that they were going into the timber and take up claims (pp. 1084-1085); and that he and the party were going in to take up claims for him (O'Keefe) and Kester. He understood O'Keefe was to get his claim and was to turn them all over to Kester himself. Taylor made the same proposition to his brother, to Dammarell, and to Prentice,

and they agreed to take up a claim under this same condition as he did (p. 1085). Taylor made proof on said claim July 11, 1904 (p. 1059), and conveyed the title to same to Kester and Kettenbach by deed dated July 12, 1904. Said deed was recorded at the request of the Lewiston National Bank January 20, 1906 (p. 1087).

THE PRENTICE ENTRY.

Joseph H. Prentice, who resided at Cloverland, Wash., took up a timber claim April 25, 1904. He testified that he was acquainted with Charles W. Taylor, Jackson O'Keefe, Kester, and Dwyer; that he was solicited to take up a timber claim by Charles W. Taylor, who was living in Asotin, fifteen miles from where Prentice lived; that Taylor went to Prentice's home and asked him if he wanted to make some money. Prentice told him he did if he could do it honestly. Taylor then spoke about taking up a timber claim. Prentice said he had no money to make the entry or make proof, and Taylor said, "Uncle Jack will loan you the money," speaking of O'Keefe. Prentice asked him if he was sure and he said, "Yes, that he was getting money from him and Ed was getting money from him and that O'Keefe told him he would loan it to you." By Ed he meant Edgar J. Taylor (pp. 1225-1226). He told Prentice at that time that it would take about \$550 to perfect the entry. He didn't say what Prentice was to get out of it, but O'Keefe did. Some days later he called upon O'Keefe at Cloverland and told him of the conversation with Taylor. O'Keefe said, "Yes, that is right. I will loan you the money and take your note for every-

thing" (p.1227), "your straight note for a year for the filing money and the proving-up money and the current expenses going up to see the timber and also to pay the locator." Prentice asked if he thought he could ever sell it, and O'Keefe said, "Yes, you can sell it. In case you get tired of the deal, I will give you \$150 over and above all expenses." That was before he went to see the land or filed application to enter. He went to view the land the following October with O'Keefe, Charley Taylor, Ed Taylor, and Ed Dammarell. Dammarell is a brother-in-law of Prentice. In the first conversation Prentice had with O'Keefe he asked what would happen if he couldn't pay the note when it was due. O'Keefe said he would take up the note and that Prentice was sure of \$150 at any rate. O'Keefe notified him when to go to view the timber (p. 1228). He gave Prentice a railroad ticket at Lewiston and furnished horses and paid for some meals on the way to the timber. Mr. Dwyer located him on the claim (p. 1228). After viewing the land with this party he returned to Cloverland. Either O'Keefe or Charley Taylor notified him when he was to file and O'Keefe paid his expenses. He gave him about \$20 either at Asotin or Lewiston for that purpose (p. 1230). He was at Lewiston nearly a week before he filed (p. 1231). He knew he could get \$150, but he said he never promised that he would sell it for that (p. 1233). Prentice was not regularly employed and did not have the money with which to take up a timber claim. He was married at the time and his family consisted of wife and two children. I. N. Smith prepared the sworn statement for him. O'Keefe

told him to go there and his papers would be prepared. He didn't pay anything for making out sworn statement. O'Keefe gave him the money to pay the filing fee in addition to the \$20 before mentioned (pp. 1233-1234). It was at Lewiston he got the money. The whole thing, you see, went in, it was counted \$50.00 for expenses for the whole transaction (p. 1236). He paid about \$400 at the land office when he made final proof with money he had gotten from O'Keefe at Lewiston the same day that he made proof; O'Keefe gave him the money in the corridor of the land office and he used that money to purchase the land (p. 1237). O'Keefe took the receiver's receipt. On the same day O'Keefe also gave him money for his location fee and told him to give it to Dwyer. It was a new \$100 bill and he gave it to Dwyer. He got \$150.00 out of the claim from O'Keefe shortly after he had proved up (pp. 1238-1239). O'Keefe said no contract or agreement could be made to sell it. Before making final proof at the land office O'Keefe told him he was to say that he had borrowed the money from a friend (p. 1244). Prentice made proof July 11, 1904, and executed a deed dated July 25, 1904, conveying the claim to O'Keefe (pp. 1245-1246). O'Keefe conveyed the claim by quit-claim deed to Kester and Kettenbach July 30, 1904. Neither deed was recorded, however, until January, 1906 (p. 1715).

THE EDGAR J. TAYLOR ENTRY.

Edgar J. Taylor, a brother of Charles W. Taylor, entered a timber claim April 25, 1904. His brother, Charles W. Taylor, spoke to him about taking up a tim-

ber claim (pp. 1110-1111). He said if they would take a timber claim they could get the money with which to enter it and get the money to pay for the claim and sell it for \$150 above cost as soon as they got title. They were to get the money for all expenses and the \$150 from O'Keefe, the \$150 to be paid them after they had made final proof; that is, they could sell it to him at that price if they wanted to (pp. 1111-1112). On the trip to the timber, O'Keefe said to Taylor that he would furnish them the money to take the claims and if they wanted to sell after they got title he would give them \$150 over and above all expenses. It was with that understanding that he took up the claim—that he was to sell the claim. O'Keefe furnished the money for the expenses from Lewiston to Pierce City and paid for the horses and other expenses from there on to the timber. They were five days going to and returning from the timber, and Taylor did not pay any of this expense; O'Keefe paid it all (pp. 1112 to 1114). He went to view the claim in October before filing in the following April (p. 1113). The party that accompanied Taylor consisted of Prentice, Dammarell, O'Keefe, and his brother. He knew that Kester and O'Keefe were in partnership at that time in connection with the Cloverland Irrigation Company; Kester was the president of the company (pp. 1114-1115). Taylor went to Lewiston a week before filing and joined the line of people at the land office. His brother, O'Keefe, Prentice, and Dammarell were also in the line. O'Keefe gave them the money to pay their filing fees at the land office (pp. 1115-1116). Later he made proof with the money O'Keefe had given him for that purpose in the

land office building. He paid \$400 at the land office, all of which he had received from O'Keefe in cash. O'Keefe also gave him \$100 at that time with which to pay location fee. Dwyer located him, and though there had been no agreement with him to pay a location fee, O'Keefe gave him \$100 and told him to pay it to Dwyer. He paid it to him about the land office; it was a new \$100 bill which he gave to Dwyer (pp. 1117-1118-1119). All the money that he paid into the land office at final proof he received from O'Keefe and the statement that he made in the land office, that part of it he had laid away and part of it he had borrowed, wasn't exactly true (p. 1119). He signed the deed either the day or the day after he made proof and was given the \$150 by O'Keefe (p. 1125). Taylor made proof July 11, 1904, and on the following day executed a deed to Kester and Kettenbach, conveying title to his land, and received \$150. The deed was recorded at the request of Lewiston National Bank, January 20, 1906 (pp. 1132, 1134).

THE DAMMARELL ENTRY.

Edgar H. Dammarell, a brother-in-law of Joseph H. Prentice, who resided at Cloverland, Wash., in 1904. made a Timber and Stone entry April 25, 1904. He was acquainted with Charles and Edgar J. Taylor and Jackson O'Keefe (pp. 1171 to 1173). Dammarell said Charles Taylor solicited him and Prentice at Cloverland to make a timber land entry, saying that he was going to take up a timber claim, and requested Dammarell and Prentice to do the same. Dammarell told him that he did not have the money. Dammarell

thinks that in the conversation with Taylor something was said as to the value of the claims and what they would net them (p. 1174). O'Keefe furnished Dammarell all incidental expenses of going to and from viewing the timber claim; the fee for preparing entry papers and for filing the same at the land office; the expenses of Dammarell of going to the land office from his home and return at the time he filed and also at the time he made his proof, and even paid the hotel bills, and gave him the \$400 with which he made proof. O'Keefe gave him this money at the Lewiston National Bank Building on the date that he made proof. On the same day O'Keefe also gave him a \$100 bill to pay Dwyer as a location fee. This he paid Dwyer in the hall outside the land office immediately after receiving it. He made the deed to O'Keefe of his claim the next day and O'Keefe gave him \$150 (pp. 1174 to 1190).

“Q. And you got just exactly what Mr. Taylor told you you could get for it when he first talked with you? (p. 1189).—A. That is the point that I don't positively remember—what Mr. Taylor said. Mr. Prentice and I disagree as to what Mr. Taylor said at that time. We have talked it over several times, and I don't remember it as he does; possibly his memory is better than mine” (p. 1190). Dammarell made proof July 25, 1904 (p. 1195). The deed of Dammarell conveying the claim to O'Keefe is dated July 26, 1904, and O'Keefe in turn quit-claimed the title to the claim to Kester and Kettenbach, July 30, 1904, both of said deeds being recorded, at the request of the Lewiston National Bank, in January, 1906 (p. 1700).

THE BINGHAM ENTRY.

David S. Bingham resides at Asotin, Wash. He testified that at the time he made his entry, April 25, 1904, he was working for O'Keefe and Kester, being Jackson O'Keefe and George H. Kester, as foreman, at a salary of \$75 a month (pp. 1139-1140). Jackson O'Keefe induced him to take up a timber claim. O'Keefe had been connected with Kester and Kettenbach in regard to the timber proposition and he asked why Bingham didn't take up a timber claim himself. He said "You have used your money up there; I don't see why you don't get some of it back." O'Keefe said he had better go down and file, which he did. He had been over the land prior to that (pp. 1141-1142). No one went over it with him to point the land out. He never talked to Kester, Kettenbach, or Dwyer. Did all business with O'Keefe. Bingham's understanding was that he had to take this claim and O'Keefe was to have the prior right of buying it after Bingham proved up. Nothing was said about the price at that time. Bingham knew that O'Keefe was in the business of assembling a great many timber claims with Kester and Kettenbach. It was his understanding that O'Keefe was a middleman working for Kester and Kettenbach (p. 1142). He was led to believe this by his conversation with O'Keefe (p. 1143). O'Keefe said he was connected with Kester and Kettenbach and would like to have a prior right to buy his claim if he felt disposed to dispose of it and that he mentioned others that he had bargained for. This conversation was before Bingham filed. When Bingham filed he was away from business probably three or four

days. This was not taken out of his salary. He was also absent from two to four days at the time he proved up. O'Keefe directed him to Lawyer Smith's office to get his filing papers. He did not give Smith any information concerning the claim and did not pay any fee for making out the papers (pp. 1144 to 1146). Bingham paid his filing fee and expenses of both trips to Lewiston but was reimbursed when he had a settlement with O'Keefe (p. 1146). Dwyer claimed he located Bingham but he had no connection with him concerning the claim up to the time he made proof. Bingham advised O'Keefe that the day to make proof had arrived. He told him to go to Lewiston to see Dwyer and Dwyer would fix it up all right in regard to witnesses (pp. 1149-1150). Bingham went to Lewiston and met Dwyer in front of the Lewiston National Bank. Dwyer said "You are proving up to-day." Bingham said "Yes; that is what I came down for"; and Dwyer put his hand in his pocket and pulled out a roll of greenbacks. He counted out \$100 and asked Bingham to hold it. Dwyer then took the \$100 from him and put it in his pocket and he said, "That's mine; that is for locating you" (p. 1150). He then said, "Now, here is \$400—four hundred and odd dollars. You go up, and I will be up pretty quick and we will prove up." Bingham took the money and walked around for a few minutes, then went to the land office and met Dwyer in the receiver's office (p. 1151), and he then made proof and paid for the land with the money he had gotten from Dwyer just a few moments before. He did not give a note for the money he received from Dwyer. Later he deeded the land to

Jackson O'Keefe. He did not read the deed (pp. 1151-1152). The day Bingham made the deed O'Keefe said "We might as well settle this here proposition up in regard to that land" (pp. 1153-1154) * * *

"Well, now, the arrangements is to let you have over and above all expenses that you was to down there, \$150." He said he had made similar arrangements for the Taylor boys (p. 1154). He gave Bingham his personal check for \$150 and Bingham acknowledged the deed (p. 1154). O'Keefe told Bingham that he had given Dammarell, Prentice, and the Taylor boys \$150 over and above all expenses and he would give him the same, and he told him he would take it (p. 1161). O'Keefe told Bingham that he, Kester, and Kettenbach were in together; that he (O'Keefe) was working as a middleman; and if these claims went through he would get a certain per cent out of them (p. 1163). Dwyer did not go over this claim with Bingham. Never had any transactions with him relative to the claim other than on the day he made final proof. Dwyer gave him no reason why he should pay him the location fee. He simply took it out of this money that he handed Bingham. Bingham said if that had been his \$516.00 he wouldn't have given him that location fee. He would have had no reason to. As it was "I didn't care what he done with it." The first talk he had with O'Keefe about taking up this land, they talked about his having the prior right or preference right. As a matter of fact it was Bingham's understanding at the time that he was going to convey the claim to O'Keefe after he got it (pp. 1166-1167). He does not think he would have taken the land up at

that time if he hadn't had that understanding. The matter turned out just exactly as he understood it would when he first talked to O'Keefe about it, and he did just what he told him in the whole transaction (pp. 1167-1168). Bingham made proof July 15, 1904 (p. 1140). At the Land Office Bingham testified that the money with which he purchased the land he had saved from his earnings and had had it in his actual possession for two years (p. 3862). Bingham conveyed the title to his claim to O'Keefe by deed dated July 26, 1904, and O'Keefe executed a quit-claim deed to Kester and Kettenbach for said land July 30, 1904. Both of said instruments were recorded in January, 1906 (p. 1482).

SUMMARY OF EVIDENCE CONCERNING THE O'KEEFE GROUP.

The testimony of Robnett mentioned herein relative to the conversation he heard at the Lewiston National Bank in the fall of 1903 or the spring of 1904 between O'Keefe and Kester and Kettenbach, in which said entrymen forming this group were named as persons that O'Keefe could secure to file on timber claims, and who would convey title to the same as directed, for from \$150.00 to \$200.00 each, and that O'Keefe was then authorized by Kester and Kettenbach to pay the expenses of said persons in connection with their claims and draw his check upon the bank in the necessary amounts, said checks to be held as cash items which Kester and Kettenbach would take care of, and on the day of proof the location fee of each entryman was paid by a one-hundred-dollar bill, which was passed to first one entryman and then another and

returned to the bank in the evening, is corroborated by the testimony of the entrymen, by Kester, and by the attending circumstances. Charles W. Taylor testified that O'Keefe stated such an agreement to him, and suggested that he make the same proposition to his brother, Prentice, and Dammarell, and this he did.

Kester, on direct examination, said:

But I remember another conversation with Mr. O'Keefe. I think it was before he went up into the timber. And he said that he had been talking with his nephews, I think, about going with him up into the timber, and that he had told them that he would like to take them in there and buy their claims. I told him that he couldn't make any such agreement with them; that that would be contrary to the law, and that he couldn't have any such agreement of that kind (p. 3157).

And on cross-examination of Kester the following appears:

Q. And you let the O'Keefe entrymen have the money with which to make proof?

A. No, sir.

Q. Did you let O'Keefe have it?

A. Well, I loaned Mr. O'Keefe some money.

Q. Wasn't it for these entrymen to make their proof?

A. I presume it was (pp. 3223-3224).

Kester did not testify until some time after Robnett had testified, and if Robnett had not actually heard the conversation he recited it would have been impossible for him to have so accurately guessed or imagined what really did take place. The fact that after the

agreements had been made with entrymen, Kester told O'Keefe that it was unlawful to make such agreements, and that O'Keefe advised the entrymen of what Kester said, should not be given weight in view of the fact that Kester and O'Keefe and the entrymen proceeded to do just what it had been originally agreed that each should do. O'Keefe furnished each entryman practically every dollar which was used in the transaction, except the few dollars that Bingham used as a filing fee. Each entryman, either the day after or shortly after making proof, conveyed to O'Keefe or to Kester and Kettenbach and received the \$150 originally promised. O'Keefe quit-claimed to Kester and Kettenbach the titles to the claims conveyed to him a day or two after said deeds were executed, but neither the deeds from the entrymen to Kester and Kettenbach nor the deeds from the entrymen to O'Keefe nor the quit-claims deeds from O'Keefe to Kester and Kettenbach were recorded for 18 months after their date. Robnett's statement that a hundred dollar bill was handed to each entryman to pay the location fee and was returned to the bank at the end of the day by Dwyer is also corroborated, in effect, by the testimony of the O'Keefe entrymen.

In some of O'Keefe's transactions he overdrew his account at the Lewiston National Bank and gave notes later for these overdrafts. The notes were from time to time renewed and a larger note given for the amount of the face of the note and interest, and later these notees were paid by Kester. As will be further shown in the summary of all the entries in the line up, O'Keefe's

received the money for the filing fees from Dwyer, and Dwyer got said money by drawing a check on the bank, which Kester and Kettenbach afterwards paid after the same had been by mistake charged to the account of Kittie E. Dwyer.

Charles W. Taylor testified that he was a nephew of Jackson O'Keefe and that O'Keefe and Kester were together in the irrigation business (pp. 1058-1059). When they started for the timber O'Keefe told Taylor that George H. Kester and some more of them were taking up claims; that Kester was going in with a crowd to take up claims; "I don't remember whether he said he was taking them up for himself, or just how he did say it" (pp. 1062-1063). Taylor at the time of entering a claim was in the employ of Kester and O'Keefe (p. 1061), and O'Keefe told him that he and Kester were taking up this land and that Taylor was to convey the same to him and receive \$150. "Q. Now did I ask you what you were to do with this land, in your first conversation with Mr. O'Keefe, what you were to do with this land to make that \$150? A. What was I to do with it? Q. Yes. A. I was to sell it to him. Q. Were you to sell it to him or some one else? A. Well, he was the one I was dealing with; he never told me about selling it to—never mentioned nobody else's name about me selling it to" (p. 1069). In the first conversation Taylor had with O'Keefe, O'Keefe said that he and Kester were going into the timber and take timber (p. 1081). O'Keefe said that he and Kester were in together; that they were going into the timber and take up claims (pp. 1084-1085).

Q. What did he say about Mr. Kester?

A. He said that him and Kester was in together, just as that affidavit said there, that they was going into the timber to take up claims (pp. 1084-1085).

Q. What about other people taking up claims?

A. Well, that is what he said, that they was, him and the parties was, going in to take up claims.

Q. For whom?

A. For him and Kester.

Q. And who was it your understanding was to get your claim?

A. Mr. O'Keefe was to get mine and he was to turn it all over to Kester himself (p. 1085).

Bingham said that at the time he made his entry he was working for O'Keefe and Kester as a foreman at \$75.00 per month (p. 1140); that O'Keefe had been connected with Kester and Kettenbach in regard to the timber proposition (p. 1141). Bingham knew that O'Keefe was in the business of assembling a great many timber claims with Kester and Kettenbach. It was his understanding that O'Keefe was a middleman, working for Kester and Kettenbach, and he got this understanding from O'Keefe (p. 1143); that O'Keefe said he was connected with Kester and Kettenbach and would like to have a prior right to his (Bingham) claim, and mentioned others that he had bargained for (p. 1154).

C. W. Taylor further testified that O'Keefe told him that he was going to take up a claim and requested him (Taylor) to take one too. O'Keefe requested Taylor to solicit his brother, Edgar J. Taylor, and Prentice and

Dammarell (Prentice and Dammarell being brothers-in-law) to enter claims also. This conversation was in the fall before they filed April 25, 1904. The proposition that O'Keefe made to Taylor was that he would furnish all the money necessary to take up the claims and then give them \$150.00 apiece over and above the expenses for the claims. Taylor made this proposition to his brother and then went to the home of Prentice and Dammarell, fifteen miles distance from Taylor's home, and repeated to them what O'Keefe had said, and they all agreed to enter the claims under those conditions. Later and before they went to view the land Prentice and Dammarell saw O'Keefe personally and talked with him about the matter, and O'Keefe then agreed with them to furnish all of the money and incidental expenses for the taking up of the claims.

O'Keefe, the two Taylors, Dammarell, and Prentice went to view the timber together. O'Keefe paid all the expenses of the two Taylors, Prentice, and Dammarell from their homes to the timber and back again, the railroad fare of Prentice and Dammarell, and all incidental expenses when they went to the land office to make their filings, paid for the preparation of their filing papers, their filing fees, and for publication of the Taylors, Prentice, and Dammarell; the expenses of Dammarell and Prentice from their home to Lewiston and return at the time they made proof, and gave the four of them \$400.00 apiece on the day of proof with which to purchase the land, and on the same day gave each of them a new one hundred dollar bill to hand to Dwyer as a location fee.

The Taylors made their proof July 11, 1904. The next day each of them conveyed their claim to Kester

and Kettenbach and received \$150.00, said deeds being recorded a year and a half later, i. e., January, 1906. Prentice made proof July 11, 1904, and received \$150.00, and the latter quit-claimed the claim to Kester and Kettenbach five days later, the latter deed being recorded in January, 1906.

Dammarell made proof July 25, 1904, conveyed his claim to O'Keefe the next day and received \$150.00. O'Keefe quit-claimed the title he had thus acquired to Kester and Kettenbach four days later, and said deed was recorded a year and a half later, i. e., January, 1906. The fact that O'Keefe conveyed the claims to Kester and Kettenbach by quit-claim deeds indicates that he was merely acting as an agent for Kester and Kettenbach and as a conduit through which the title passed.

Jackson O'Keefe made his entry April 25, 1904; made his proof and paid for the land July 11, 1904 (p. 1424); and receiver's receipt was recorded by George H. Kester September 2, 1904. O'Keefe conveyed to Kester and Kettenbach by deed dated June 16, 1906 (pp. 1712, 1713). O'Keefe was dead at the time of taking testimony in these cases, but enough has been said to show that he took up the claim for Kester and Kettenbach.

Bingham made proof July 15, 1905, conveyed his title to O'Keefe July 26, 1904, and received \$150. O'Keefe executed a quit-claim deed to Kester and Kettenbach July 30, 1904, and that deed was recorded in January, 1906.

The circumstances surrounding the Bingham entry are significant for a number of reasons, but especially as bearing upon the bona fides of the location fee that was handed to Dwyer by the entrymen forming the

O'Keefe group and others forming the line-up, which are mentioned later, and leading strongly to the conclusion that the passing of a one hundred dollar bill or other amounts in a different form to Dwyer as a pretended fee for location were merely to lend color and give the transaction the appearance of legality and to make evidence to be used on some future occasion.

Thus Bingham testified that O'Keefe sought him and induced him to enter a timber claim, his understanding being that O'Keefe was to have the prior right to buy it after proof. He was not located on the timber by anyone, having been over the claim some time before by himself. Up to the day that Bingham made proof he had no conversation or relations with Dwyer relative to the claim. On that day Dwyer accosted him on the streets of Lewiston and said "You are proving up to-day." Bingham replied: "Yes; that is what I came down for." Dwyer then put his hand in his pocket and pulled out a roll of greenbacks. He counted out \$100 and asked Bingham to hold it. Dwyer then took the \$100 from Bingham and placed it in his pocket with the remark "That is mine; that is for locating you." Dwyer then said, "Now, here is \$400—four hundred and some odd dollars. You go up and I will be up pretty quick and we will prove up." Bingham said that if the \$516 had been his he wouldn't have given Dwyer any location fee; that he would have had no reason to, but as it wasn't his money "I didn't care what he done with it." When Bingham made his deed O'Keefe said: "We might as well settle this proposition up in regard to that land. Well, now, the

arrangement is to let you have over and above all expenses that you was to down there, \$150," stating that he had made a similar arrangement with the Taylor boys.

From the foregoing and the testimony of the O'Keefe entrymen as to what they agreed to do and what O'Keefe agreed to do in regard to their entering the timber claims and what each of them did do step by step throughout the entire transaction, there can be no question that each of these claims was entered upon an understanding or agreement made prior to entry that in consideration of O'Keefe furnishing all of the money necessary to purchase the land and all incidental expenses in connection with the entry, that the entrymen would convey their claim to him or to whomsoever he would direct for \$150.00; nor can there be any question that the conversation recited by Robnett occurred between Kester, Kettenbach, and O'Keefe before the initiation of any of said entries and that he truthfully recited what he heard and that in the entire transaction O'Keefe was acting as the agent or co-conspirator of Kester and Kettenbach, and what he did and what he said, and what he commissioned Charles W. Taylor to do and say in furtherance of their unlawful design were binding upon, and in law were the acts of Kester and Kettenbach.

If O'Keefe was not acting as the agent of, or in conjunction with, Kester and Kettenbach in the procurement of these entries for Kester and Kettenbach, upon what theory of logic could it be concluded that O'Keefe would seek out four or five impecunious persons; suggest to them the taking up of a timber claim; agree to

furnish them all of the money for that purpose; accompany them to the timber, to the land office when they filed, and to the land office again when they made proof; there being nothing in it for him, not even the location fee, that being formally handed from him to the entrymen and by them to Dwyer? In fact the court said: "Were a case of fraud in the entry shown (Taylor entry) it might very well be concluded that the defendants, if they did not participate therein, at least had knowledge thereof, or were put upon inquiry relative thereto, by reason of their dealings with O'Keefe" (p. 329).

It seems to us that the evidence as a whole is conclusive to the point that said entries were fraudulently made, and that Kester and Kettenbach and Dwyer were parties to the fraud, and that the facts and circumstances surrounding these entries are as strong, if not stronger, than the facts and circumstances upon which the court held other entries in these cases to have been made in fraud of the statute.

The trial court, speaking of the entry of Charles W. Taylor, said in substance that the evidence in relation to this entry is unsatisfactory and insufficient to justify the cancellation of the entry, and that in the examination of Taylor, counsel for both sides indulged in questions which were highly leading; and after stating the agreement testified to by Taylor whereby O'Keefe was to purchase the claim and pay therefor the specified sum of \$150 and to furnish all the funds necessary to secure title, further said that later and some time before the entry was made O'Keefe told him, Taylor, that he had learned that such an agree-

ment could not lawfully be made; and again, "but his (Taylor's) final word, while upon the witness stand, was to the effect that he had no understanding or agreement by which he was to sell to O'Keefe or to any other person" (pp. 339 to 342). The court then quotes at length from the testimony (pp. 339 to 342). Though these observations were made in reference to the Taylor entry, they seem to have affected the court in reaching its conclusion in respect to the other entries in this and the other groups.

During the investigation in 1905 of the entries involved in the present cases, Taylor made an affidavit for the inspectors for the Interior Department as to the terms upon which he made his entry and of his agreements with O'Keefe. Later he testified before the grand jury on several occasions relative to said entry and also at two trials at which Kester and Kettenbach were on trial charged with criminal conspiracy in connection with their acquisition of the lands involved in the present cases. After the conviction of Kester and Kettenbach at one of the trials mentioned at which Taylor had testified, and while the present cases were pending, the law partner of one of counsel for the defense in the present cases presented to Taylor at his home a copy of the testimony he had given at the trial aforesaid and told him to read it (p. 1077). Later (November 10, 1910) and while the present cases were still pending, defendants secured an affidavit from Taylor (and also from each of the entrymen forming the O'Keefe group, the Steffey group, and other entrymen, which will be hereafter mentioned) somewhat at variance with the testimony he had given before on the

occasion mentioned (p. 4125). Though Taylor appears to be illiterate, he possesses quite a degree of shrewdness, which he exercised on a number of occasions while testifying in the present cases, in what seemed an endeavor on his part to shade his testimony given at former trials, where that testimony tended to show an unlawful agreement between himself and O'Keefe relative to his entry. And while he did not evince any real hostility toward the Government, he was very susceptible to a sympathetic and friendly cross examination conducted by counsel for the defense. In such circumstances it would seem permissible for counsel for the Government to indulge in leading such a witness and to cross-examine him in an effort to get such witness to testify truthfully concerning transactions, and no greater weight should be given to testimony of such a witness elicited on cross-examination by the defense than by that brought out by the Government in response to leading questions, notwithstanding said witness was called to testify by the Government. The statement made by Kester to O'Keefe and by the latter repeated to the entrymen, that it was unlawful to make an agreement before entry to sell, was entirely unnecessary, as O'Keefe and the entrymen knew that such an agreement was unlawful, and it was merely made as a subterfuge by which Kester and O'Keefe hoped to successfully evade the timberland law, and to escape the consequences of their unlawful conduct should they be brought to trial therefor.

This entry and all other entries involved in the present cases were procured to be made, and the cases tried upon the theory announced by Kester when the entry-

man Cornell advised him that an inspector was investigating the Cornell and other entries, and mentioned the fact that the Government was also investigating violations of the timber law in Oregon and other States. Kester said: "All that man is here for is to look into some timber trespass cases, * * *." "Oh, well, nothing of that kind will happen in Idaho. If there should something of that kind occur, why I would be the man they would be after. *You, Dwyer, and I are the only persons that know anything in regard to this agreement. If we all deny it, how can any trouble come to us?*" (p. 2823).

THE KESTER-KETTENBACH-DWYER GROUP.

THE WILSON ENTRY.

In the fall before entering the claim, April 25, 1904, Guy L. Wilson saw Dwyer concerning the matter and Dwyer told him he could borrow the money for him to enter a claim and that when the claim was sold and the location fee was paid and all expenses were deducted, Wilson would get \$150.00 for the claim (pp. 377 to 380). At the time of the first conversation between Dwyer and Wilson the latter did not know to whom he was to sell the claim. He supposed Dwyer would sell it for him (p. 380). Dwyer was to furnish all the money (p. 385). Wilson went to view the claim with his mother-in-law, Mrs. Frances Justice-Clausen, Dwyer, and others (pp. 381-382). On this trip they were away from Lewiston several days and Wilson did not pay any of the expense of travel or hotel bills (pp. 382-383). In the following spring Dwyer advised Wilson of the time to file and told him to join the line at the land office (p.

384). Wilson did not pay the lawyer who prepared the fees at the land office the day he filed (pp. 387-388). Wilson was in line at the land office a part of seven days before filing and the rest of the time his position in the line was held by a Mr. Case. Dwyer gave Wilson \$14.00 to pay Case for holding his place (pp. 388-389). Wilson asked Dwyer if he would have to perjure himself at the land office in making his Sworn Statement. Dwyer told him he had no agreement and that he was taking it up for his own use and benefit, as he would be benefited by it (pp. 393-394). On the day of making final proof Dwyer gave Wilson \$500.00. Dwyer told him to return the \$100.00, which was in one bill. This Wilson did and Dwyer then said he had paid him the location fee. The balance of the money, \$400.00, he received from Dwyer, he paid into the land office in payment for the land that day. When Dwyer gave Wilson the \$400.00, the latter made a demand note to Kester and Kettenbach (pp. 395 to 397). On the afternoon of the same day he went to Otto Kettenbach's office with Dwyer and executed a deed conveying the claim to Kester and Kettenbach. Nothing was said by either Dwyer or Wilson about selling the claim after the first conversation they had about the claim before Wilson filed. He delivered the deed to Dwyer and received \$136.00. The entire transaction turned out exactly as it was outlined to Wilson by Dwyer at that first talk about the claim, and Wilson received exactly what he expected to get with the exception that he did not get the \$14.00 paid Case (pp. 397 to 403). Wilson admitted that the answer he gave in the land office that the money he used he had saved from his earnings and had

had the same for two and a half years was not true, and that he had gotten the same from Dwyer within an hour before making the statement (pp. 403-404). When Wilson executed the deed at Kettenbach's office, he was proceeding on the understanding that he had with Dwyer when he first talked with him about the claim. Dwyer gave him \$136.00 in cash at Otto Kettenbach's office. There was no discussion between them relative to the amount Wilson was to receive between the time they first talked about the claim and when he gave Wilson the \$136.00, and it was not discussed then. Dwyer simply handed Wilson the money (pp. 405-406). At the trial of Dwyer in 1907 on a criminal charge growing out of the same transaction, Wilson testified that: "Mr. Dwyer said all our expenses would be paid and we would get about, when we could turn these over, he could make about \$150.00 out of this for us. Q. Now, give the exact language so that the jurors can hear it, what he (Dwyer) said to you. A. Well, he said that it would not cost us anything to take the trip and that there would be about \$150.00 in it for me," and relative to the sworn statement Wilson also testified: "He (Dwyer) said that this agreement that I had with him was only verbal and that wouldn't stand in the road at all, that I was taking this land up for myself, that I would derive the benefit from it." Wilson testified that the answers that he made at the land office were false and that Dwyer induced him to make them (pp. 408 to 412). On the day that Wilson made proof he gave Dwyer the final receipt. Later, when the Land-Office inspectors were investigating the transactions of Kester and Kettenbach, Dwyer returned the receipt to Wilson

and instructed him to keep it, saying that there were inspectors around, and that if they asked him whether he owned the land for him to say that he did and ask them whether they wanted to buy it (pp. 419 to 420). Wilson made proof July 13, 1904 (p. 376). The deed of Wilson's conveying the title to his claim to Kester and Kettenbach was dated the same day, but was not recorded until June 24, 1907, and then at the request of the Lewiston National Bank (p. 1519). The demand note that Wilson made to Kester and Kettenbach the day he made proof was delivered to Wilson's wife later in the day. After the deed was made she went to the Lewiston National Bank, asked for the note, and the same was delivered to her without paying the same (p. 443). Mrs. Wilson heard a conversation between Dwyer and her husband relative to the answers that Wilson should give at the land office to questions that would be asked him. She said: "Mr. Dwyer said he wanted to give Mr. Wilson some pointers on the questions that he had to answer, and he said to tell them that he had the money, or its equivalent, to pay for his claim, and Mr. Wilson asked if he had to perjure himself when he answered the question, and Mr. Dwyer said not to worry about that—it was a thing which was done every day"; that Dwyer also said that the agreement between them was only verbal, but that Mr. Wilson would get the money just the same (pp. 435 to 441). This is another instance of the \$100 bill being handed to the entryman and then back to Dwyer as a pretense of paying Dwyer a location fee. This evidence also shows that the conspiracy entered between Kester, Kettenbach, and Dwyer, and their concerted action in regard to the un-

lawful acquisition of timber claims, was still in full force and operation. The court in holding this entry invalid, and in ordering that it be canceled, said: "I am satisfied from the testimony of the entryman, reluctantly given, that, while there was no express agreement *there was a perfect understanding* between him and the defendant, Dwyer, acting as the agent for Kester and Kettenbach, that all the expenses incident to the acquisition of title should be paid by Dwyer and that the entryman was to receive \$150, in consideration of which he was, upon acquiring title, to convey the same to Kester and Kettenbach. It is not necessary to decide whether or not Kester and Kettenbach had any actual knowledge of the arrangement with Dwyer; Dwyer being their agent, they are charged with notice" (p. 286).

THE EDNA P. KESTER ENTRY.

Edna P. Kester, wife of defendant, George H. Kester, and sister of Mamie P. White, testified that she entered a timber claim April 25, 1904 (pp. 736-737). Dwyer located her on the claim. She went into the timber in October, 1902. Mr. and Mrs. Wm. J. White, Mrs. Elizabeth White, Elizabeth Kettenbach, Martha Hallett, George H. Kester, and Dwyer composed the party. Mrs. Hallett was a close friend of the Kester family, and they were boarding with her at that time. George H. Kester paid all the expenses incident to entering the claim and purchasing the land (p. 738). At the time she made final proof she paid something over \$400.00 into the land office, which she got from her husband the morning she made proof. She has not sold the claim and still has it (pp. 739-740) and holds the same for Kester, Kettenbach, etc.

THE FRANCES A. JUSTICE ENTRY.

Frances A. Justice, now Frances A. Clausen, entered a timber claim April 25, 1904. She testified that she is the widow of David Justice, who died five years ago, and the mother of Fred Justice, who also died about five years ago (p. 845). Dwyer located her on the claim. Before going to view the claim, which was five months before she filed, she had an agreement with Dwyer whereby he was to furnish her all the money incident to filing on the claim and making proof and purchasing the same. He did not tell her how much she would get out of the claim, but, after figuring at the prices claims were then selling, it would be somewhere about \$200.00 more than the expenses (pp. 855 to 858). Mrs. Clausen had told Dwyer that she did not have the money to take up a claim (pp. 1367-1368). Dwyer paid her expenses to and from the claim. He furnished her with the money to pay for the location fee, and for filing, and to pay for the land at final proof (pp. 1367 to 1387). Though Mrs. Clausen received the money for final proof from Dwyer, at the land office, in response to the question where she had received the money and how long she had had the same in her actual possession, answered that she sold fruit and had had it in her possession one month (p. 1389). On the day Mrs. Clausen made proof she gave the final receipt to Wm. Dwyer, and Dwyer gave her \$150.00 and she went to the bank, and the note which she gave Dwyer earlier in the day was returned to her. Dwyer told her to go to the bank and get it (pp. 1397-1398). Mrs. Guy Wilson accompanied her, and Guy Wilson's note was given Mrs. Wilson at the same time (p. 1399).

Mrs. Clausen testified at the trials of Wm. Dwyer in the fall of 1906 and of Kester, Kettenbach, and Dwyer in the spring of 1907. Just before the trial in 1907 Mrs. Clausen left her home without advising the family where she was going and went to Spokane, Washington. Upon reaching Spokane she immediately purchased a ticket for Seattle, and at Seattle she registered at the Tourist Hotel as Mrs. Frances. From Seattle she went to Vancouver, and she registered at the Empire Hotel as Ada Crocker. From there she went to Victoria. From Canada she returned to Moscow, while the trials were in progress, in the company of Mr. Glover, a Government officer. At the criminal trials just referred to, Mrs. Clausen testified that she had an agreement with Dwyer. In explanation of why she had sworn falsely in her sworn statement and at final proof at the land office she stated that Dwyer had told her that it was only a verbal agreement, and a verbal agreement was no agreement (pp. 850 to 855, 1370 to 1396, 1397 to 1412). The receiver's receipt issued to Frances Justice the day she made final proof, July 13, 1904, was recorded March 30, 1906. On that date Frances A. Justice executed a deed conveying her claim to Kittie E. Dwyer, which was recorded later at the request of Wm. Dwyer (p. 1497). The deed or contract made by Mrs. Clausen the day she made proof is not of record. The claim entered by Frances A. Justice was assessed to her for the year 1905, but the taxes thereon were paid by Kittie E. Dwyer for that year. The claim was also assessed in the name of Frances A. Justice for the year of 1906, and for that year the taxes were paid by Kittie E. Dwyer, and, though assessed to

Frances A. Justice for year 1907, the taxes were paid by Kester and Kettenbach (p. 1538). As to the entry, the court said: "While the evidence of a prior agreement is not so conclusive as that in relation to the Wilson entry, I am satisfied from all the facts and circumstances, including the attitude and conduct of the entrywoman herself, and the failure of the interested parties to explain certain incidents exclusively within their knowledge, that the entry was initiated with an understanding between the entrywoman and Dwyer that she should receive a specified amount, free of all expenses, and should convey the title to or in compliance with the demands of Dwyer. The patent in this entry is therefore held for cancellation" (pp. 287-288).

THE ELIZABETH KETTENBACH ENTRY.

Elizabeth Kettenbach has resided at Lewiston for eight years. She testified that she is a sister of Frank W. Kettenbach and an aunt of William F. Kettenbach. She made a timber entry April 25, 1904 (pp. 1557-1558). She went to view the claims with Kester and his wife, Mr. and Mrs. White, and Mrs. Hallett. George H. Kester made the arrangements, because she remembers paying him her part of the cost of the trip, \$22.25 (pp. 1558-1559). She viewed the land in October, before she filed (p. 1560). Does not know who prepared her filing papers, nor does she remember of paying a fee for that service (p. 1561). Mrs. White and she took their places at the end of the line at the land office. Will. Kettenbach might have suggested Mr. Dwyer's name as locator (pp. 1563-1564). She paid Dwyer \$100.00 in cash the day they proved up (p. 1564). Paid four hundred and some dollars to the

land office in cash upon making final proof. She borrowed \$500.00 from her nephew, William F. Kettenbach, with which to make proof (p. 1566). She received this money at the bank and went directly from the bank to the land office and paid the money in (pp. 1567-1568). At the land office they asked her where she received the money that she was paying into the land office and how long she had had the same in her actual possession, and she thinks she told them she inherited the money. She remembers saying in answer to question 17 that she got the money from the sale of real estate and had had the same in her possession for 6 months (pp. 1568-1569). The title to this claim is still in Elizabeth Kettenbach, but Kester, on February 14, 1906, gave an option on the same, claiming it as his and Kettenbach's (pp. 2125, 3937). Said tract was assessed by the tax assessor in the name of Elizabeth Kettenbach for the year 1905, and the taxes for that year were paid by her. For each year since, the property has been assessed in her name, but for the years 1906 and 1907 the taxes were paid by the Idaho Trust Co. For the year 1908 taxes on the claim were paid by Kester and Kettenbach (pp. 1539-1540). At final proof at the land office Elizabeth Kettenbach swore that the money with which she purchased the land she had received from the sale of real estate and had had it in her actual possession for 6 months, when in fact she had received it from W. F. Kettenbach but a few minutes before (p. 3896).

THE ELIZABETH WHITE ENTRY.

Elizabeth White, the mother of Wm. J. White and mother-in-law of W. F. Kettenbach, made a timber-

land entry April 25, 1904. Mrs. White testified that Dwyer located her and she paid him \$100.00 or \$200.00 for that service after she filed. She viewed the timber in October before she filed in April. She talked with Wm. F. Kettenbach about taking up a claim and told him she was going to file. Paid \$400 or \$500 in the land office when she made proof. The claims, the title to which passed through her name, she knows very little about. She knows little about the claim she entered. Referring to the Robnett claim, she says she supposes Robnett borrowed the money from W. F. Kettenbach and that the claims were in settlement of the money loaned. The matter was all attended to by W. F. Kettenbach. She does not know that she ever sold a timber claim (pp. 743 to 768). An option was given on this claim by Kester Feb. 14, 1906, in which he referred to it as our timber (pp. 2125, 3937). In 1905, 1906, 1907 said claim was assessed for taxes in the name of Elizabeth White, but were paid by the Lewiston National Bank (p. 1540). Further mention will be made of this claim in connection with the transfer of Robnett's and other claims through Mrs. White's name, which will show that she acted as the agent for Kester and Kettenbach in the entry of this claim as well as in regard to said other claims.

THE WILLIAM J. WHITE ENTRY.

William J. White, son of Elizabeth White, husband of Mamie P. White, brother-in-law of W. F. Kettenbach, and also brother-in-law of George H. Kester, entered a timber claim April 25, 1904. He said Dwyer located him, for which he paid Dwyer \$100. Also made

arrangements for his wife to take up a claim. He talked with W. F. Kettenbach about the claims he and his wife were going to enter and Kettenbach said they were pretty good claims. Thinks he paid \$200 in the land office the day he made proof, also gave his wife the money to pay for her claim. Sold his claim and his wife's to Elizabeth White (pp. 490 to 508). At the date White made proof his bank account was overdrawn at the Lewiston National Bank \$746.07, but he was allowed to overdraw to take up this claim (p. 206). In an option given by Kester February 14, 1906, this claim was referred to as our timber (pp. 2125, 3937). In 1905 and 1907 said claim was assessed for taxes in the name of Wm. J. White and paid by the Lewiston National Bank (p. 1540).

THE MAMIE P. WHITE ENTRY.

Mamie P. White, wife of William J. White, made an entry the same day her husband did. She said her husband had given her money with which she entered and paid for the claim. Dwyer located her and after proof she sold to Elizabeth White (pp. 588 to 600). Dwyer located Mrs. White. She went to the timber with her husband and his relatives. At the date she made proof her husband's account at the bank was overdrawn, as has been heretofore stated. Kester gave an option on this claim and referred to it as our timber, while the title was still in Mrs. White February 14, 1906 (pp. 2125, 3937). In 1905 and 1907 said claim was assessed for taxes in the name of Mamie P. White and were paid by the Lewiston National Bank (p. 1541).

THE HALLETT ENTRY.

Martha E. Hallett made an entry April 25, 1904. She testified that at that time Kester and his wife boarded with her. She had no other boarders (pp. 1592-1593). Kester had attended to her business for a number of years (p. 1603). She spoke to Kester about a timber claim and accompanied him and the rest of his party to the timber in the fall before she filed. Dwyer located her and she paid him \$100 about time she made proof (pp. 1592 to 1598). Got money from Kester to make proof. Does not know whether it was in the form of a deposit or whether she drew a check (p. 1600). Still holds title to claim. Martha E. Hallett did not have an account at the Lewiston National Bank during the months of April, May, June, and July, 1904, at the time she made entry and proof (pp. 2002-2003).

THE GREENBURG ENTRY.

Daniel W. Greenburg made a timberland entry April 25, 1904. He says he went to view the claim in October, 1903, and was located by Dwyer. At date of entry was a newspaper reporter but not regularly employed and did not have the money with which to purchase a claim. Borrowed \$200 or more from the Lewiston National Bank (Kester) to purchase the claim. Negotiated for the loan with Kester and does not know whether Kester made the loan personally or for the bank. Sold claim to Kester shortly after proof. Greenburg made proof July 15, 1904, and executed a deed conveying title to said claim to Kester and Kettenbach August 15, 1904, which deed was recorded by Kester January 24, 1906 (pp. 700 to 713).

THE McMILLAN ENTRY.

William McMillan entered a claim April 25, 1904. He testified that at that time he lived on a ranch about 40 miles from Lewiston and was employed in carrying the mail. In the fall preceding the taking of this claim, Kester was at McMillan's ranch and asked him if he had used his right for the timber claim and whether he was not going to take one. McMillan replied that he did not know anything about timber claims and that he didn't have the money without he mortgaged his ranch, and that he would not do. Kester told him that if he decided to take a claim he would help him out and furnish him the money, which he did (pp. 532 to 535). Kester further told McMillan that he could make \$100 or \$150 out of the claim, over and above the expenses anyhow, and McMillan said he was well satisfied with that if he could make that much. Kester further told him that it would come in the market pretty soon. (The township in which this claim is located was not open to entry at that time) (pp. 535 to 537). McMillan understood that he could turn the claim over to Kester, or Kester and Kettenbach, and as Kester had told him about the claim he would give him the preference (p. 538). He felt under obligations to give Kester the preference right to purchase (p. 550). About a week after this conversation with Kester, McMillan went to see the claim. He was not acquainted with Dwyer but had seen him and heard he was a locator, so he arranged with Dwyer to locate him. Bliss, who was working for Dwyer, located him (pp. 536 to 539). He saw Kester the day he filed and again when he made proof. He received \$300 from

Kester to make proof and did not give a note for the same nor did he pay any interest on the money furnished him (p. 541). "Q. And was there any arrangement or agreement as to when you should repay him, the money you had gotten from him? A. No, well, I don't know; when I sold him the timber claim I would pay him the money" (p. 541). At final proof McMillan, in reply to the question as to where he had gotten the money to pay for the land and how long he had had it in his possession, said that he had "saved it from his earnings" and had it for 6 months (p. 543), and he paid the money he had gotten from Kester to Dwyer at final proof. McMillan conveyed the claim to Kittie E. Dwyer (pp. 545-546). The deal was conducted through William Dwyer whom he understood was doing business with Kester, as Kester told him whatever business he did with Dwyer was all right with him. Before selling claim to Dwyer, McMillan asked Kester if he could sell to Dwyer and whether it would be all right, and Kester replied that it would (p. 543). "Q. How much did he (Dwyer) give you? A. He gave me \$200. Q. Is that all you got? A. I got all my expenses and money to pay for proving up and everything." He gave Dwyer the money Kester had advanced him and then had \$200 clear (p. 544). Would not have sold to anyone but Kester or some one Kester agreed to for that price (p. 547). McMillan made proof July 18, 1904, and the receiver's receipt is recorded April 9, 1906. The deed of McMillan conveying title to his claim to Kittie E. Dwyer is dated April 9, 1906, and is recorded at the request of Dwyer (pp. 1500-1501). This claim was assessed in

the name of McMillan for the years 1906 and 1907, but the taxes thereon were paid for both years by Kester & Kettenbach (p. 1543). On February 14, 1906, Kester included this claim in an option he gave and referred to it as our timber (pp. 2125, 3937). Kester and Kettenbach also paid the filing fees on this claim (pp. 3759, 3758).

As to this claim the court said: "There was some sort of a general promise by Kester, who seems to have been very friendly to the entryman, giving him assistance if he needed financial help when it came to making his final proof. A careful consideration of the entryman's testimony convinces me that he did not have any understanding, expressed or implied, by which he was to sell the land to any person, and that no other person had any interest in the entry. The entryman apparently did feel under some moral obligation to give to the defendant Kester an opportunity to purchase, but such obligation involved only a recognition by the entryman that Kester favored him by loaning him a part of the money required for the final proof" (p. 296).

THE HATTIE ROWLAND ENTRY.

Hattie Rowland, who did not testify, is the wife of Benjamin F. Rowland, entered a timber claim April 25, 1904. Shortly after Kester's visit to McMillan the latter talked with his neighbors, Ben Rowland and his wife, and told them they ought to take up a timber claim and make a little money, too; that they could probably make \$100 or \$200 (p. 547). Mrs. Rowland made proof April 9, 1906, and conveyed her

claim to Kittie E. Dwyer by deed of the same date, which was also the date of McMillan's deed, and it was recorded at the request of William Dwyer (p. 1508). Though this claim was assessed in the name of Hattie Rowland for the year 1907, and the title in Kittie E. Dwyer, the taxes were paid by Kester and Kettenbach (p. 1543), and in the option given by Kester February 14, 1906, the claim is referred to as our timber (pp. 2125, 3937). Kester and Kettenbach also paid the filing fees on this claim (pp. 3758-3759).

The court takes up each part of the evidence pointing to the invalidity of this entry and discusses the same separately and states that there is little significance in such circumstances, but that they are merely suspicious circumstances, and concludes that "It is not thought that it (one of the suspicious circumstances referred to) or all the evidence taken together is sufficient to warrant a finding that the patent was procured by fraud, or that any one of the defendants acquired any interest in, or had any control over, the claim prior to final proof" (p. 295).

In commenting on a bit of evidence and the chain of circumstances establishing the fraud, the court said: "It is suggested that while the lands were assessed in Hattie Rowland during the year 1907 the taxes were paid by Kester and Kettenbach, but there is little significance in the circumstances. It is known that taxes are very frequently paid upon behalf of the owner by agents or friends, and in this case it seems that for the year 1905 the taxes were paid by the Lewiston Abstract Company, although the land was assessed to Hattie Rowland, and during the year 1906, while the assess-

ment was in the name of Hattie Rowland, the taxes were paid by Kittie E. Dwyer. In the years 1908, 1909, the taxes were assessed to and paid by Kittie E. Dwyer" (p. 293). What we have been endeavoring to establish by the evidence is the fact that an agency existed between Kester, Kettenbach, Dwyer, and the several entrymen, and as a link in the proof to that end we have pointed out a number of instances wherein Kester and Kettenbach had paid the taxes on claims, the record title of which was in the names of persons they had procured to make entries for them. In view of all the circumstances surrounding said entries, it is plain that in respect to paying the taxes thereon Kester and Kettenbach were not acting merely as the friends of the entrymen, but in interest of themselves. Whatever agency existed was not that Kester and Kettenbach were the agents of the entrymen, but rather that the entrymen were the agents of Kester and Kettenbach throughout the entire transactions. The title deeds to the entries involved in these suits were kept off the record by Kester and Kettenbach in many instances from one year to two years for the purpose of concealing the fact that they owned the claims, and for the same purpose in other instances the titles were conveyed to other persons in trust for Kester and Kettenbach.

Again, in commenting on this claim, the court, in discussing the option given by Kester and the plats that were attached to it, said, "Upon the plat is a notation to the effect that the *x* indicates lands of Kester and Kettenbach, while the circle indicates lands belonging to individuals. There is no notation as to the class of lands designated by circle X (X). Under

all the circumstances disclosed by the record it is not thought that much significance can be attached to this piece of *evidence alone*. The plats were apparently prepared hastily, and were clearly erroneous in some respects. There was no necessity at the time for being entirely accurate as to the ownership of lands or the precise status of the title. The deed from Rowland to Dwyer was executed a short time after these plats were prepared, and it is entirely possible that the defendant Dwyer at the time had arranged for or knew that he could secure the lands * * *'' (pp. 293-294). The purpose of this evidence to be considered together with other evidence in the case, and not alone, was to establish the fact that Kester, Kettenbach, and Dwyer did own claims jointly and Kester referred to them as "our timber," notwithstanding the fact that in this record he and Kettenbach disclaim any interest in the claim or any connection with Dwyer relative to this or any other claim in the suits. And still further, the court says, "Another circumstance relied upon is the inclusion of the name of the entrywoman in a group of names, and endorsed in the handwriting of the defendant Kettenbach upon a deposit slip, dated April 26, 1904." But while the slip, with its endorsement, may present a suspicious circumstance, it and the other evidence is not sufficient to establish fraud (p. 295).

The deposit slip mentioned was introduced simply to show that the defendants had paid the filing fees of this and 11 other entrymen in the suits, though they denied paying such fees. This payment was made by Dwyer, and the money obtained by him giving his check upon the Lewiston National Bank, and instead

of the check being charged to Kester and Kettenbach or held in the cash, as was customary, it was charged to the account of Kittie E. Dwyer, and the day after such payment, Kettenbach, in order to correct this mistake and to reimburse Mrs. Dwyer's account, made a deposit slip crediting her account the aggregate sum of the amounts paid the several entrymen and wrote the names of each entryman on the back of the deposit slip as a memorandum. Further mention of this deposit slip will be made in its proper place in connection with the other entries.

EVIDENCE BEARING GENERALLY UPON ALL THE ENTRIES IN THE "LINE-UP."

It will be remembered that in the "line-up" of April 25, 1904, there were nineteen persons, all of whose entires are in the present cases, and the names of the nineteen entrymen appear here in the order in which their entries were made at the land office, under the subheading "The line-up."

The entrymen forming the line-up are those whose entries compose the "O'Keefe group" and "Kester-Kettenbach-Dwyer group," hereinbefore referred to.

THE DEPOSIT SLIP.

A deposit slip of the Lewiston National Bank showing a deposit to the account of Kittie E. Dwyer in the sum of \$96.00, dated April 26, 1904, the day after the entries in the line-up were made at the land office, and the notation on the back of the slip and the evidence relating thereto, has an important bearing upon the question of who paid the filing fees for said entries, and affects seriously the credibility of Kester, Kettenbach

and Dwyer, who disclaim paying said filing fees. This bit of evidence was introduced at page 3759 of the record. The writing on both the front and the back of this slip is in the handwriting of William F. Kettenbach, and the following is what appears on either side thereof:

THE LEWISTON NATIONAL BANK, LEWISTON, IDAHO.
Deposited by Kittie E. Dwyer.

4-26-1904.

Two cks given to Wiggin for cash.....	98
50	
48	
—	
Less cash.....	2
	<hr/> 96

(Written on back of deposit slip.)

Guy Wilson.....	8
Greenburg.....	8
Bingham.....	8
McMillan.....	8
Mrs. Rowlands.....	8
J. O'Keef.....	8
Prentice.....	8
E. Taylor.....	8
Dammarell.....	8
Mrs. Justice.....	8
C. W. Taylor.....	8
F. Justice.....	8
	<hr/> 96
J. O'Keef.....	8
	<hr/> 88

Therefore the names on the back of the deposit slip are the names of the six O'Keefe entrymen and six of the Kester-Kettenbach-Dwyer group in the line-up, who, together with the Kester and Kettenbach kinsfolk, complete the nineteen.

It is to be remembered that William Dwyer had no account at the Lewiston National Bank in his own name, but for his personal expenses drew checks on

said bank in his name and that the same were charged to the account of his wife, Kittie E. Dwyer. For expenditures by Dwyer in acquiring timber claims for Kester and Kettenbach and in advancing to entrymen money for their applications, for final proof and for paying their incidental expenses in taking up claims, Dwyer drew checks upon the Lewiston National Bank in his own name and by placing in one corner of said checks the letter "K" with a circle about it, the said checks, instead of being charged to the account of Kittie E. Dwyer, were held in the cash as cash items and later were taken up by, or charged to, the "land account of Kester and Kettenbach."

In a number of instances, expenditures made by Dwyer for Kester and Kettenbach, in which Dwyer's checks were given, the latter would fail to attach the (K) and the same, by mistake, would be charged to the account of Kittie E. Dwyer, and when that mistake was discovered either Kester or Kettenbach would take said checks out and credit the account of Kittie E. Dwyer in that amount, all of which has been mentioned in connection with the (K) checks under the subheading "Circle K checks (K)."

It appears that on April 25, 1904, the date the nineteen entrymen filed in the land office, Dwyer, according to his testimony, gave two checks upon the Lewiston National Bank in the sum of \$48.00 and \$50.00, respectively, for matters connected with Kester and Kettenbach's timber deals, and that the checks were cashed by one Wiggin (pp. 3767 to 3769); and that \$2.00 of these amounts was used by Dwyer personally. To these two checks Dwyer failed to attach the (K) and

on that day the two checks for \$50 and \$48, respectively, were charged to the account of Kittie E. Dwyer. The mistake was discovered and the following day, to correct the error, Wm. F. Kettenbach made out a deposit slip and credited the account of Kittie E. Dwyer the amount of the two checks, less the \$2.00 Dwyer had used for his own purposes; i. e., \$96.00 (pp. 3756 to 3758). (The original of this deposit slip is marked "Plaintiffs' Exhibit No. 120" and is on file in the office of the clerk of this court.)

At that date when an entryman filed application to enter land under the timber and stone act, he was required to deposit in the land office \$8.00 for the publication of notice. That was the filing fee required (p. 3764).

William F. Kettenbach admits that the memoranda on both back and front of the slip are in his handwriting. The names on the back of the deposit slip in Kettenbach's handwriting are those of twelve of the entrymen who had filed the day before and were twelve of the aforesaid nineteen in the line-up, the other seven in the line-up being the relatives of Kester and Kettenbach before mentioned; and each one was required to pay into the land office the \$8.00 set out opposite his name.

Therefore, it appears that Dwyer had drawn the checks on the bank for the amount necessary for the twelve entrymen to pay their filing fees at the land office and had handed O'Keefe the filing fees for the entrymen forming his group, and that Dwyer paid the fees of the remaining entrymen personally, as is shown by the evidence recited herein in connection with their entries.

The explanations by Kettenbach and Dwyer relative to this matter are given at pages 3761 to 3771 of the record.

Mr. Kettenbach explains that it was merely incidental that, in making notation for the issuing of certificates of deposit for the register and receiver of the land office to be sent to publishers of newspapers for publication of entries made that day, he used the back of a deposit slip for that memorandum, and the following day he happened to pick up the same deposit slip and used it in crediting the account of Kittie E. Dwyer. There is no question that the money used by Dwyer was for Kester's and Kettenbach's transactions, and that Kettenbach was reimbursing Kittie E. Dwyer's account for the charge erroneously made to her account, instead of being held as a cash item and taken up by Kester and Kettenbach.

The explanation of Mr. Kettenbach is not persuasive, when you consider the transaction as a whole and the absolute improbability of the story. In the first place, Mr. Kettenbach, to substantiate his statement, produces the Certificate of Deposit Ledger of the Lewiston National Bank of the 25th of April, 1904, showing that two certificates of deposit were issued to two local newspapers in the sum of \$151.70 each (p. 3761). If the amount of either of the certificates of deposit had been in the amount of the notation on either side of the deposit slip, it might be considered in corroboration of his explanation.

The force of his explanation is lessened still further by the fact that Mr. Kettenbach did not issue any certificate of deposit on that date, but all certificates

that were issued that day are in the handwriting of Mr. Bradbury, the teller (pp. 3762 to 3765). Further, it is not at all probable that the receiver or register of the land office, desiring to purchase two certificates of deposit, each in the sum of \$151.70, would go to his banker and give the names of twelve persons whose publication fees were to be paid out of one or the other of said certificates, and it is much more improbable that the names mentioned should happen to be the particular twelve referred to. Besides, it is not explained why the amount furnished O'Keefe should be deducted; his entry had to be published just the same as the other entries.

The matter on the front of the deposit slip is so closely allied and related to that on the back, as not to admit of the explanation given, or of any other conclusion than that it is one and the same transaction. This, together with the other evidence on the subject mentioned in connection with each entry separately, is conclusive that Kester and Kettenbach paid the filing of said twelve entrymen.

SUMMARY OF EVIDENCE CONCERNING THE "O'KEEFE GROUP" AND THE "KESTER-KETTENBACH-DWYER GROUP" (THE LINE-UP.)

From the foregoing it appears that Kester and Kettenbach in one form or another, or by one device or another, furnished every entryman of the "O'Keefe group" and the "Kester-Kettenbach-Dwyer group" practically every dollar they used in connection with their entries. All of the entrymen, except Bingham, were taken to the land the preceding October by Dwyer. Kester furnished the money for McMillan and Greenburg

to make proof and also for filing (see deposit slip); and Dwyer furnished the money to Wilson (p. 3385), Frances Justice (p. 3384), and Fred Justice (p. 3400) with which to make proof and received the same from Kester for that purpose, and the filing fees were also furnished from the same source (see deposit slip). Fred Justice made proof July 13, 1904 (p. 1423), and conveyed his claim to Kester and Kettenbach the same day, the deed not being recorded until June, 1906 (p. 1704), no mortgage being given. All the proof we have is that Kester and Kettenbach furnished all the money to Fred Justice through Dwyer, and the latter did as his mother and Guy Wilson did—conveyed the claim the day he made proof.

The arrangements were made by Dwyer with Wilson and Mrs. Justice before going to view the land to furnish the money for all expenses and to purchase the land, Mrs. Justice making the arrangements for her son, and Kester promising the needed amount for McMillan before he entered the land.

The evidence mentioned in connection with each particular entry shows the arrangements or agreements upon which each of said persons entered his or her claim; the amount that each received for the claim; and the date of the conveyances to Kester and Kettenbach or Dwyer; and on the whole that said entries were made pursuant to antecedent agreements for the use and benefit of Kester, Kettenbach, and Dwyer.

Edna P. Kester, Elizabeth Kettenbach, Elizabeth White, William J. White, Mamie P. White, and Martha E. Hallett are the persons referred to by O'Keefe in his conversation with Taylor that were to be taken into

the timber, and they were taken to the timber in the fall of 1903, and Dwyer showed them over the land.

Mrs. Kester and Mrs. Hallett received the money from Kester with which to purchase their claims; Miss Kettenbach received all the money from Wm. F. Kettenbach for the purpose of initiating the entry, purchasing the claim, and paying the location fee, and Wm. J. White was permitted to overdraw his account at the Lewiston National Bank for the purchase of his wife's and his own claim.

Dwyer testified that he cruised said townships with a view of locating people on them, and that he picked out for those he took into said townships in the fall of 1903 the best claims that were available (pp. 3375 to 3381). In explaining, then, why those lands were not selected for the State when he was employed for that purpose in March of the following year, before the nineteen persons he had shown over the claims filed, Dwyer's testimony lacks candor and savors strongly of quibble and equivocation.

Dwyer testified to the effect that he showed the entrymen over all of the townships and that they would be equally as well satisfied with one quarter section as another. This, however, is at variance with the testimony of some of the entrymen; at least, the Taylors in their affidavit made for the defendants and introduced in evidence by them, shows that there was some particularity on their part as to the claims they were to enter, and Charles W. Taylor in his affidavit (defendants' Exhibit E, p. 4125) said: "In locating us he (Dwyer) would take us across and over the claims and would point out or select one member of the party

and say: 'This is yours,' and show the party his corners;" and E. J. Taylor in his affidavit, offered as defendants' Exhibit G (p. 4134), said that Dwyer told him: "Here is a good claim. I will locate you on that if you want it."

Dwyer says the entrymen when they got to the land office in April did not file on what was their first choice, but filed on the next best that was left (pp. 3380 to 3385). It would seem that from said affidavits the entrymen had but one choice.

Complainants' Exhibit No. 118 is a plat of Twp. 38 N., R. 5 E., and Exhibit 119 is a plat of Twp. 38 N., R. 6 E. The originals of both of said exhibits are on file in the office of the clerk of this court. On said plats are marked the lands selected by the State and also those of the said nineteen entrymen who filed the day after the State made its selection.

From reading the testimony, record pages 3032 to 3041, with said township plats before you, it will appear that the timber selected by the State in said townships cruised only from a million and a quarter to a million and a half or two million feet to the quarter section. while the claim of Jackson O'Keefe, being the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, sec. 23, T. 38 N., R. 5 E., cruised two and a half to three million feet of timber; the claim of Edna P. Kester, being the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, sec. 14, T. 38 N., R. 5 E., cruised two and a half million feet to the quarter (p. 3035); that the claims of J. W. Lane and T. G. Malone, being the S. $\frac{1}{2}$ sec. 7, T. 38, R. 6, cruised each three million feet to the quarter section; and the quarters in sections 18 and 19, T. 38, R. 6, cruised three million feet to a quarter section. The

last described claims are the Prentice, E. J. Taylor, M. E. Hallett, Frances A. Justice, E. Bliss, Dammarell, Sanders, and Caldwell claims (p. 3039). The claim of Charles W. Taylor, being the NW. $\frac{1}{4}$ sec. 30, T. 38, R. 6, cruised two million feet to the quarter section, and that the claim of Fred Justice, being the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, sec. 20, T. 38, R. 6, cruised two million feet to the quarter section (p. 3040).

Therefore, it will be seen that in carrying out the scheme of Kester, Kettenbach, and Dwyer to acquire Government timber lands in Twp. 38 N., R. 5, and Twp. 38 N., R. 6 E., in the fall of 1903, before said townships were opened to entry by the public and even before the plats of survey had been filed, Dwyer had taken the nineteen entrymen hereinbefore mentioned on the claims in said townships and said claims were entered the following spring on the day the land became open to entry by the persons thus shown the claims.

**KESTER AND KETTENBACH SECURE APPOINTMENT OF
DWYER TO ASSIST IN MAKING STATE SELECTION IN
SAID TOWNSHIPS.**

As has been stated before, on February 24, 1904, the plats of survey of T. 39 N., R. 5 and 6 E., T. 38 N., R. 5 and 6 E., T. 40 N., R. 5 E., B. M., were filed in the land office at Lewiston and under the law the State had a preference right of sixty days in which to make and file its selection, and said townships became open to entry by the public on April 25, 1904.

These are the townships upon which Dwyer had taken the nineteen persons forming the O'Keefe group and the Kester-Kettenbach-Dwyer group in the preceding October, and said persons filed, as aforesaid, the

day after said townships became open to entry by the public.

Robnett testified that in December, 1903, or January, 1904, in W. F. Kettenbach's office at the Lewiston National Bank, Kettenbach and Kester discussed the feasibility of having Goldsmith employ Dwyer to assist him in going over the timber and making the selection for the State (p. 2245) in said townships. Kester stated that if Dwyer should be so employed he could leave out of the State selection such claims as they (Kester and Kettenbach) desired to locate entrymen on (p. 2246). It was agreed that Kettenbach would discuss the plan with Goldsmith, Kettenbach assuring Kester that he could "arrange that." Several days later Goldsmith came to the bank and saw Kettenbach, and the latter suggested that he appoint Dwyer as one of the selectors for the State. Goldsmith stated that he did not know that he could make the appointment, as Dwyer was not a resident of the State of Idaho, but a resident of Washington; but that he would consider the matter. Shortly thereafter Goldsmith returned to the bank and told Kettenbach that he would employ Dwyer (pp. 2247-2248).

Goldsmith, Scott, Dwyer, and Lafferty went into the timber March 26, 1904, for the purpose of examining the timber for the State selection, and the same party returned from the timber to Lewiston April 18, 1904 (pp. 3669 to 3672).

Dwyer testified that he cruised and estimated Townships 38 N., R. 5 E., Twp. 38 N., R. 6 E., and Twp. 37 N., R. 6 E., with Mr. Goldsmith (p. 3370).

A day or two before the State made its selection, Goldsmith was again at the bank and Kettenbach gave him a list of claims furnished by Dwyer that he (Kettenbach) did not desire to be included in the State selection (pp. 2249 to 2252).

At the time Dwyer was assisting in making the State selections he was still associated with Kester and Kettenbach in the procurement and location of entry-men as hereinbefore stated, and for a week prior to the day the State made its selection Dwyer had in line at the land office, Jackson O'Keefe, Charles W. Taylor, Joseph H. Prentice, Edgar J. Taylor, Edgar H. Dammarell, George H. Kester, Guy L. Wilson, Edna P. Kester, Frances A. Justice, Fred E. Justice, Elizabeth Kettenbach, Elizabeth White, Wm. J. White, Mamie P. White, Martha E. Hallett, Daniel W. Greenburg, David S. Bingham, Hattie Rowland, and Wm. McMillan, all of whom he and O'Keefe had taken to view the timber the preceding October upon the terms and conditions herein stated, and the claims selected by Dwyer and O'Keefe to be located upon by the above-mentioned friends and relatives of Kester, Kettenbach, and O'Keefe for the benefit of Kester, Kettenbach, and Dwyer were superior in quality to the selections made in the same townships by Dwyer for the State (pp. 3044 to 3047), as hereinbefore shown.

During that period Norman Jackson was chief clerk of the State land board, and took some part in this selection. Lafferty was regularly employed by the State as a timber cruiser (pp. 1432, 1433, 3667, 3668).

Mr. Jackson left the matter as to what the State would select in said townships entirely to Goldsmith,

and the others herein mentioned worked under Goldsmith's supervision. Goldsmith furnished Jackson with a list of the lands the State should select, and the selection was made as suggested by Goldsmith by the list he furnished. The list of selections was filed the day before the land became open to entry (pp. 1432-1433).

**KESTER'S ATTEMPT TO INFLUENCE ACTION OF CHIEF
CLERK OF STATE LAND BOARD.**

Just before Jackson filed the State selection at the Lewiston land office he said he was approached by Kester at Lewiston. Kester invited Jackson to take a drive with him (p. 1436). Kester stated to Jackson that he had furnished Mr. Goldsmith with the plats of those townships, which were very valuable to Goldsmith and enabled him to make intelligent selections, and that he had given Goldsmith other valuable information relative to the timber in that locality, and that in consideration of that the State should not select certain timber in said townships, so that he (Kester) might scrip the same. He said that he had held the scrip for about a year and that he thought it would be in justice to him to give him an opportunity to place it, as he had benefited the State to so great an extent (p. 1435-1436).

The testimony of Robnett to the effect that Kester and Kettenbach, after discussing the matter between themselves, agreed to try to have Dwyer appointed to assist in making the State selections in order that the land they had contemplated acquiring in said townships would not be selected by the state, and to this

end sought Goldsmith and induced him to employ Dwyer for that purpose, although Dwyer was not a resident of the State of Idaho, is strongly corroborated by the concurrent circumstances, evidenced by the further fact that Kester endeavored to induce Mr. Jackson, clerk of the land board, not to select in said townships certain tracts of land that he (Kester) wanted, in consideration of services that Kester had rendered Mr. Goldsmith in these selections, in furnishing him plats of the townships which Kester explained were very valuable in enabling Goldsmith to make intelligent selections; and the significant fact that the state did not select the nineteen entries before referred to, though the timber upon said claims is greatly superior in quantity to the timber upon the quarter sections selected on behalf of the state.

DWYER CONTESTS.

The next link in the chain showing the determination of Kester, Kettenbach, and Dwyer to acquire Government timber lands in said two townships are the contests instituted by Dwyer and the circumstances surrounding the devolution of the title to the claims thus contested to Kester, Kettenbach, and Dwyer.

It was agreed between Kester, Kettenbach, and Dwyer, after said nineteen entrymen applied to enter and before any of them had made proof, that Dwyer should contest a number of homestead entries made in said townships, and should he prevail at the hearing, he would have persons he held in readiness for that purpose, apply to file upon said claims under the timber and stone act (pp. 2232 to 2235), and then convey the claims to them.

Pursuant to this arrangement, Dwyer in May, 1904, filed contests against sixteen homestead entries in said townships and said claims were subsequently entered under the timber and stone law, a number of them by the relatives of Kester and others by employees of Dwyer, and still others by persons procured by Dwyer to enter them under a prior agreement; and in all cases the lands so entered were later conveyed to Kester and Kettenbach or to the wife of Dwyer.

George W. Miller filed a homestead entry on a quarter section in sec. 24, T. 38, on February 24, 1904. Wm. Dwyer in May of the same year filed a contest against said entry and the case was closed by a relinquishment October 28, 1904. Later said claim was filed upon under the Timber Land Act by Mabel K. Atkinson, a sister of George H. Kester, and Mrs. Atkinson conveyed the title to said claim to Wm. F. Kettenbach and George H. Kester in May, 1906 (pp. 1441-1442).

Charles F. Shumaker filed a homestead entry in sec. 29, T. 38, October 29, 1903. Wm. Dwyer filed a contest against the same the following May and the contest case was closed by a relinquishment September 6, 1905. On the same day Jos. F. Atkinson, brother-in-law of George H. Kester, entered said claim under the timber and stone act and after final proof conveyed said claim to Wm. F. Kettenbach and George H. Kester (pp. 1442-1443).

Charles B. Thornberg filed a homestead entry in sec. 29, T. 38, February 24, 1904. Said claim was contested by Wm. Dwyer May 25, 1904, and a relinquishment obtained, and later Charles S. Myers entered said claim under the timber act upon prior agreement, and after

making proof conveyed the title to said claim to Wm. F. Kettenbach and George H. Kester March 21, 1906 (pp. 1443-1444). (Myers is one of the Steffey group.)

On February 24, 1904, Charles G. Vogelmann filed a homestead entry in sec. 7, T. 39. Wm. Dwyer contested this entry May 25, 1904, and said contest case was closed by a relinquishment in November, 1905, and Frank L. Moore made a timber and stone filing on said claim (p. 1445).

Wm. B. Walker filed a homestead entry April 6, 1904, for a quarter section of sec. 20, T. 38. A contest was filed against said entry May 25, 1904, by Wm. Dwyer and the contest case was closed by a relinquishment, and Hiram F. Lewis made a timber and stone entry of said claim under a prior agreement and later conveyed title of said entry to George H. Kester and Wm. F. Kettenbach (p. 1446).

Walter Williams filed a homestead entry on a quarter of sec. 15, T. 38. A contest was filed against this entry by Wm. Dwyer May 25, 1904. The contest was closed by a relinquishment of the entry. On August 23, 1904, the date of the relinquishment, Charles Carey made a timber and stone filing on said claim under a prior agreement, and in April, 1905, conveyed title to the same to Wm. F. Kettenbach and George H. Kester (p. 1447).

Albert J. Flood made homestead filing in sec. 15, T. 38, in February, 1904. Wm. Dwyer contested said entry May 25, 1904. The contest case was closed by a relinquishment of the entry July 11, 1904. On the same day Albert G. Kester, brother of George H. Kester, entered said claim under the timber and stone act

and later conveyed the title to said claim to Wm. F. Kettenbach and George H. Kester. The said deed was recorded at the request of Wm. Dwyer (p. 1448).

John P. Harlan entered a quarter section of land of sec. 28, T. 40, under the homestead law. Wm. Dwyer filed a contest against the same October 4, 1904. The contest was later dismissed by the Secretary of the Interior (p. 1449).

Wm. R. Lawrence made homestead filing on a quarter of sec. 15, T. 38. This entry was contested by Wm. Dwyer May 25, 1904, and the case was closed by a relinquishment July 11, 1904. On the same day Benjamin F. Rowland, husband of Hattie Rowland, of the "Line-up," entered said claim under the timber and stone act and later conveyed the title to said claim to Kittie E. Dwyer (p. 1450).

On February 24, 1904, Fred H. McConnell made homestead filing on a quarter of sec. 30, T. 38. Wm. Dwyer filed a contest against said entry in May, 1904, and the case was closed by a relinquishment August 5, 1904. On the same day Malvern C. Scott, who assisted Goldsmith and Dwyer in cruising for the State selections, entered said claim under the timber land law, and on February 5, 1906, conveyed the title to said claim to Wm. F. Kettenbach and George H. Kester (p. 1451).

Frank A. McConnell made homestead filing on a quarter of sec. 20, T. 38, February 24, 1904. This claim was contested by Wm. Dwyer and the case closed by a relinquishment December 12, 1904. Margaret A. Miller on the same day entered said claim under the timber and stone act and later conveyed title to the

claim to Kittie E. Dwyer, the deed being recorded at the request of Wm. Dwyer, her husband (p. 1452).

On February 24, 1904, Albert Anderson made homestead filing in sec. 30, T. 38. This claim was also contested by Wm. Dwyer, May 25, 1904. The contest was closed by a relinquishment, December 12, 1904. Mary E. Sherman on the same day made a timber and stone filing on the same claim and later conveyed the title to the same to Kittie E. Dwyer (p. 1453).

George G. James entered land in sec. 8 and 9, T. 38, under the homestead law, February 24, 1904. Wm. Dwyer filed a contest against this claim and the contest was closed by a relinquishment September 21, 1904. On the same day George C. Davenport made timber and stone filing on said claim and later conveyed the title to the same to Wm. F. Kettenbach and George H. Kester (p. 1454).

John McHardie on April 18, 1904, filed a homestead entry on a quarter of sec. 19, T. 38. Wm. Dwyer filed a contest against said entry in May, 1904. The contest case was closed by a relinquishment of the entry September 8, 1904. On the same day Edwin Bliss, an employee of Dwyer (p. 3306), and who also assisted Dwyer and Goldsmith in cruising for the State selections, entered said claim under the timber and stone act and later conveyed title to the claim to Wm. F. Kettenbach and George H. Kester (p. 1455).

Carl Rogers made homestead filing for NE. $\frac{1}{4}$, sec. 12, T. 38, R. 5 E., B. M. Rogers later relinquished this claim and filed on the same under the timber and stone act. This latter filing was contested by Wm. Dwyer May 4, 1906. The contest was closed by a

relinquishment March 14, 1908. On the same day some Northern Pacific scrip was filed on said claim, the nonmineral affidavit being executed by Wm. Dwyer (p. 1457).

On February 24, 1904, L. Grace Rogers made a homestead entry in sec. 12, T. 38. This she relinquished and filed upon said claim under the timber and stone law. Contest was filed against this entry by Wm. Dwyer, and the receiver and register of the land office held in favor of the contestant. The papers in the case were transmitted to the General Land Office, and no further action has been taken upon them. Northern Pacific scrip was filed on this entry, and Wm. Dwyer made the nonmineral affidavit. Later a half interest in said claim and the one last preceding, was conveyed to Wm. F. Kettenbach, and a quarter interest was conveyed to George H. Kester, said deed being recorded at the request of Wm. Dwyer (p. 1457).

Susan Comstock made a homestead filing May 25, 1904, in sec. 29, T. 39, R. 5 E., B. M. Wm. Dwyer filed a contest against said claim May 25, 1904, and the contest case was closed by a relinquishment October 26, 1904. On the same day Edward M. Lewis entered a portion of said claim under the timber and stone act, upon a prior agreement, and Wm. E. Helkenberg entered the remainder of the claim under the timber and stone act on the same day. The property so entered by Lewis and Helkenberg was later conveyed to George H. Kester and Wm. F. Kettenbach (p. 1459).

THE HIRAM F. LEWIS ENTRY.

Hiram F. Lewis, who has resided at Lewiston for about nine years and who made entry under the

timber and stone law of the homestead claim of Wm. B. Walker which was relinquished after a contest by Dwyer, had testified at two criminal trials relative to the manner in which he had taken up said claim and had also made an affidavit before a special agent of the land office concerning the same. At the trial of Wm. Dwyer in the fall of 1906 on the charge of subornation of perjury, and also at the trial in the spring of 1907 of Wm. F. Kettenbach, George H. Kester and Wm. Dwyer charged with conspiracy to defraud the Government of timber lands, Lewis testified that Dwyer suggested to him the advantage of making a timber land entry; that prior to making the entry Dwyer agreed to give him \$150.00 for his right at the time the claim was turned over to them; and that he received \$150.00 from Kester pursuant to said agreement. He made practically the same statements in the affidavit in 1905. He also testified that the statements made in his sworn statement were untrue and that he knew they were untrue at the time of making the statement (pp. 901 to 1055). At the present trial he testifies that Dwyer told him that they had some good timber claims and if he wanted to take one of them he could make a little money out of it (p. 905). He obtained a relinquishment from Dwyer before entering the claim and filed the same at the land office at the time he made application to enter (p. 927). He now says that Dwyer didn't say he would give him \$150.00 because he got \$250.00 (pp. 905 to 915), and that he received \$250.00 from Kester (p. 917). He got \$200.00 from George H. Kester with which to make proof. He made the arrangements with Kester himself. He

met Dwyer and Kester together on the street one day and they talked about this claim. He thinks it was after he had entered it (pp. 927 to 929). With part of the money Lewis received from Kester he paid his filing fees (pp. 946-947). Dwyer gave him a copy of the final proof papers to read before he made proof (p. 933). Dwyer asked Lewis if he had a brother and said he had another relinquishment of a claim that the brother could get. Hiram Lewis procured his brother Edward M. Lewis to enter a timber claim, to which Dwyer furnished the relinquishment (p. 932). A contest was filed against the entry made by Edward M. Lewis. The expense of this contest was paid by Hiram Lewis and he was reimbursed for the amount thus expended by Kester (p. 937). Hiram Lewis got most of the money from the Lewiston National Bank for the expenses of his brother in taking up his claim (p. 956). Both claims were conveyed to Kester; \$150.00 was received for Edward M. Lewis's claim over and above expenses for his own claim (p. 957). (Pp. 901 to 1003, Lewis's testimony.)

THE EDWARD M. LEWIS ENTRY.

Edward M. Lewis made a timberland entry October 26, 1904 (p. 2042), on the homestead claim of Susan Comstock that had been contested by Dwyer and relinquished. His brother, Hiram F. Lewis, told him he had a chance to take up this claim and that he was to go to the timber with Dwyer. He did not have the money with which to enter this claim, but Hiram told him to leave it to him and that it would be all right (pp. 2444-2445). Two days after this conversation he,

in company with Dwyer, started for the timber. They were three days on this excursion, all the expenses of which were paid by Dwyer. Several days after his return from the timber Edward, at the direction of Hiram, went to the law office of one Mullen, where his filing papers were prepared. Mullen had a description of the land (pp. 2045-2046); he did not pay Mullen a fee for preparing said papers; and Dwyer named the witnesses for final proof. Before filing, Hiram F. Lewis told him he would see that he got the money with which to take up the claim (p. 2046). He received the money with which to pay the filing fee at the land office just before filing from Dwyer (p. 2055). He did not pay anything for the relinquishment, nor did he pay a location fee. His brother gave him a check with which to obtain the money for final proof, and he did not use a dollar of his own money in the transaction; nor did he give a note for the money furnished him (p. 2047); nor did he pay any interest on said money; and nothing was said about returning it (p. 2048). After proof a contest was filed on forty acres of this claim, and Dwyer advised Edward Lewis to retain Mullen to defend the case, and stated that he thought the fee would be about \$30.00. Following Dwyer's advice, he retained Mullen and paid him \$30.00. He told his brother of this expenditure, who said it would be returned to him, and he was later reimbursed for that amount as hereinbefore stated (pp. 2048, 2049, 2051, 2059, 2060). Hiram F. Lewis told Edward that he (Edward) did not own the claim and had no right to sell it, but that "it belonged to these other parties and Dwyer" (pp. 2050, 2051, 2056). Edward afterwards deeded the

property to Hiram (p. 2050), who turned same over to Kester, Kettenbach, and Dwyer. Edward received \$125.00 out of the claim (p. 2051). At the trial of the criminal cases Edward and Hiram Lewis agreed that they would stand together and give no more information than they had to. Hiram told Edward not to tell anything that would get him into trouble (p. 2066).

THE CAREY ENTRY.

Walter Williams, who resides at Oakdale, Wash., made the homestead filing in the Lewiston land office in February, 1904, hereinbefore referred to. He and Albert Flood were notified that contests had been filed against their claims. They went to the land office to inquire into the matter, and were there referred to Wm. Dwyer. Dwyer told them that they couldn't prove up on the land, and that as it would cost him \$50.00 to contest the claims, he was willing to give them that amount of money if they would relinquish the claims. After discussing the matter, Williams and Flood concluded that it would be best to accept Dwyer's offer, and the same day they made out their relinquishments at the Lewiston National Bank. Dwyer and Wm. F. Kettenbach were present at the time and Kettenbach said, as Dwyer had, that they would not lose their right to make another homestead filing. Later they sent to Williams through the mail a check for \$50.00 (pp. 1023 to 1028).

Charles Carey, in August, 1904, was conducting a shooting gallery and cigar store at Lewiston, and later was employed by a butcher. Carey wanted to get a timber claim. He asked "Scotty" (Malvern C. Scott)

if he could find him a claim. Later Scotty told him that he knew where he could get a claim and he thought that Carey would be able to get \$150.00 out of it. Scotty introduced him to Dwyer, saying that "he (Carey) is a good boy; he is an all right fellow,—and told how long he had known me and different things." Dwyer said he could locate him, but that he didn't think that there would be over \$125.00 in it for him. Dwyer said, "The least said about it the better; I had better keep it to myself." Scotty told Carey he thought Dwyer would furnish him the money with which to take up the claim. Dwyer did not take him to the claim. Carey had been in that locality on a fishing trip at one time, and was pretty sure he had been on the land (pp. 551 to 555). Dwyer gave Carey the relinquishment that he had received from Williams, and Carey entered the land thus relinquished under the timber and stone act. Carey did not pay anything for the relinquishment, nor was he requested to pay for it (p. 556). Dwyer prepared his filing papers and gave him the money with which to pay the expenses incident to filing. He understood from Scotty that Dwyer would furnish all the money that was needed. Dwyer did give him the money, but did not inquire whether it was needed or not (pp. 556 to 558). The day before final proof Dwyer gave Carey \$400.00 for that purpose. At Dwyer's suggestion, he purchased a certificate of deposit with the money, as Dwyer said it would look better. Dwyer discussed with Carey the propriety of the latter swearing that he did not purchase the land on speculation, etc., but he does not remember whether it was in regard to the sworn statement or final proof.

He does remember, however, that Dwyer said, "You are taking it up for your own benefit. If you can sell it you will get something for yourself." Dwyer gave him a set of the final proof papers to take home with him, and told him that Scotty would inform him as to answers to the questions about which he was not sure. Dwyer told him there was nothing wrong about it, that he was taking it up for his own benefit (pp. 559 to 562). He made final proof with the \$400.00 that Dwyer had given him, and swore that it was his own money (pp. 562 to 563); said that he earned the same in his business and had had it for twelve years (p. 563). Immediately before making proof, Dwyer gave Carey \$150.00, and immediately after proof he handed that amount back to Dwyer, who gave him a receipt for it as a location fee (p. 565), and immediately after that, "Well, we went to the California Wine House, and he (Dwyer) gave me \$125.00." Q. Now, what did he give you that for? A. Well, that was for—he said when I took up the claim; he said I could get that much out of it if I wanted to sell it. Q. And that was carrying out his part of the agreement, was it? A. Well, yes; I think so, as I understand it (p. 566). * * * Q. What did you consider that \$125.00 was for that he gave you at the wine house? A. I considered I took up his proposition of \$125.00. That was ten minutes after he made proof (pp. 568 to 569). When Carey first talked to Scotty, he understood that he was to get \$150.00 for his right (p. 570). In going over the questions with Dwyer before final proof, Dwyer said, "You haven't any agreement to sell" (p. 576). Immediately after making proof he went to the office of one Ketten-

bach and signed and acknowledged a printed paper before Kettenbach. He doesn't know whether it was a deed or not. A few minutes thereafter he was given the \$125.00, and that is all the money he got out of his claim (pp. 567 to 568).

Albert J. Flood gives practically the same testimony relative to the relinquishment, as did Williams, and understood that the same was to be held in escrow until they had got a filing on the land (pp. 1003 to 1009). Kester's brother then entered claim under the timber and stone act, and conveyed to Kester and Kettenbach (p. 1450).

THE STEFFEY GROUP.

AGREEMENT BETWEEN STEFFEY AND DWYER AND KNOWLEDGE THEREOF BY KESTER AND KETTENBACH.

In the fall of 1905 Harvey J. Steffey, a timber cruiser and locator, living at Pierce, Idaho, who had been interested in one or two timber claims with Dwyer and Kester and had been employed by and worked in the woods with Dwyer (pp. 1745 to 1751), entered into an agreement with Dwyer that Steffey would procure a number of persons to enter timber claims upon agreements between Steffey and the persons so to be secured, to be made prior to the initiation of the entries, that Steffey would locate said persons on timber claims, pay their filing fees and furnish them with the money to pay for the land and all incidental expenses, and that said persons would after proof convey the claims thus entered to Kester and Kettenbach and be paid by Steffey \$150 to \$200 each for their services. Steffey was to check upon the Lewiston National Bank for the money necessary to carry out this agreement, whether

or not he had sufficient funds in that institution to meet said checks, and Dwyer assured him that the checks would be honored. At that time Steffey knew that Kester, Kettenbach, and Dwyer were "working together in timber claims" (pp. 1751 to 1755, 1758, 1772-1773, 1750-1751, 1803). Dwyer told Steffey that he (Dwyer) was to get a third interest in the land so located after title to the same was acquired, and the other two-third interest was to go to Kester and Kettenbach (pp. 1802 to 1804); and that he (Steffey) would be (treated) all right—he would get his share (p. 1772). Kester also told Steffey that he would see that he received what was due him and that he need have no fears whatever (p. 1803). Kester further advised Steffey to leave the matter to him and he would get what he claimed, and requested him not to make any trouble about it (p. 1856).

Pursuant to this agreement with Dwyer, Steffey procured the following-named persons to enter timber claims: Charles S. Myers, Jannie Myers, Mary A. Loney, Charles A. Loney, James T. Jolly, Effie A. Jolly, Clinton E. Perkins, and Frank J. Bonney. Each of said men had married sisters of Mrs. Myers, and at the time their entries were made Steffey was boarding at the home of another sister of Mrs. Myers, a Mrs. Gaffney.

These claims are known as the Steffey entries. Said claims were entered pursuant to an agreement between Steffey and said named persons that Steffey would locate them on timber claims, furnish them with the money to make their applications to file and to pay for the claims, and all expenses in connection there-

with, and that after final proof said entrymen and entrywoman were to convey the claims so filed upon and entered to whomsoever Steffey would designate, and that Steffey would pay them \$200 apiece (1771, 1870-1871). These agreements were made before said persons so procured had made applications to file on the land or taken any steps whatever to initiate the entries. Under said agreements Steffey located said persons on timber claims, paid their expenses to and from the land and their expenses from their homes to the land office at Lewiston and return, both when they filed and when they made proof and purchased the land. Steffey also paid their filing fees and the expense of publication, and gave each of them the amount of money necessary to pay for the land. After final proof said persons conveyed the title to the land they had acquired to Kester and Kettenbach and Steffey paid them \$200 apiece, except one who entered an eighty-acre claim, and to that Steffey paid \$175. The money expended by Steffey in securing said claims was obtained from the Lewiston National Bank on his check, and in many instances there was not a sufficient credit balance in the account to cover the amount of the checks (pp. 1777-1778). Before any applications had been made to file on any of these claims, Steffey had discussed with Dwyer the character of the claims and the conditions upon which the proposed entrymen would take up the claims. As to one of said claims, which they intended to secure through a proposed entryman whom Steffey said he could procure to enter the same for \$100 or \$150, Dwyer said he could get a number of persons to enter that claim for \$100, the

claim referred to being a homestead entry of Thornberg that Dwyer had contested, as hereinbefore mentioned. This claim was later entered by Myers. Steffey and Dwyer had gone over a number of these claims together before filings were made thereon and others they had examined before the money was furnished the entrymen to make proof and pay for the land (pp. 1772 to 1775, 1783, 1790 to 1793, 1800 to 1803, 1752). The advisability of locating Entrymen Loney and Jolly on two of said claims was discussed at the bank between Steffey and Dwyer in the presence of Kester, and when it was decided that they would secure those claims by locating Loney and Jolly upon them Kester was much pleased at the prospect of obtaining two such good claims and agreed that it was advantageous to get claims of that quality. Steffey said: "I had looked up the claims, and came down to Lewiston to meet Mr. Dwyer, and told him I had two exceptionally good claims, and that I had some people to put on them, and he said 'All right,' and he asked me about the claims, and I told him that one of them was exceptionally good, I thought; and we went into the bank, and he told Mr. Kester about the matter, and I compared it to another claim called the Dellmarie, (this is the Carrie D. Maris claim referred to as one of the Robnett group) and told him one of them was better than that, and he asked me if I had anybody to put on them, and I told him I had, and he said if it was better than the Dellmarie claim that we would have a champagne supper. Q. That was Mr. George H. Kester said that? A. No; it was Mr. Dwyer that said that. Mr. Kester was inside of the railing of the

bank. Q. Well, did I understand that the discussion as to the comparative merits of these two claims was discussed with Mr. Kester? A. Right before Mr. Kester, yes. Q. And this Dellmarie claim that you refer to, is that the Carrie D. Maris claim? A. That is the one; yes'' (pp. 1783-1784). This discussion was before the entrymen had filed (1783, 1790, 1850 to 1854).

On one occasion when Dwyer was out of town Steffey went to see Kettenbach to arrange for money for two of said entrymen to make proof. He asked Kettenbach where he was to get the money for that purpose and also talked with him about his overdrafts. Kettenbach stated that he would arrange to have the money for final proof for the two entrymen at the Idaho Trust Company. This arrangement, however, was not made, and later Kettenbach told Steffey to draw his check upon the bank for the money needed (pp. 1807-1808). The two entrymen were with Steffey when he drew the money for their proof, and Kettenbach was familiar with everything he was doing and knew what he wanted the money for (pp. 1807-1808). The paying teller of the bank was given a general authorization by Kester to pay Steffey's checks when his account was overdrawn. When Steffey's overdrafts aggregated several thousand dollars, the matter was submitted to Kester for his O. K., and on several occasions the teller did call Kester's attention to Steffey's overdrafts (p. 2781). On one occasion Kester directed the bookkeeper to honor all of Steffey's checks. He said that if Steffey overdrew his account it was all right as Steffey was up in the timber cruising and locating for them and at times was buying timber for them (Kester and

Kettenbach) (p. 2329). Steffey didn't charge any of said persons that he located a location fee and he was not paid a location fee, nor was a fee for location included in the expenses (p. 1773). Steffey told said entrymen that he didn't have an agreement with them, in order that he might protect himself, Kester, Kettenbach, and Dwyer as much as possible (pp. 1759, 1866, 1867). As has been stated, all the money used by Steffey for the entrymen to file and perfect said entries was drawn from the Lewiston National Bank on Steffey's individual check, whether he had a credit balance or not. The balance of the \$200 due to each entryman was paid in the same way at the dates of the transfers of the claims from the entrymen to Kester and Kettenbach.

In the testimony of Steffey, on cross-examination, occurs the following:

Q. What did he (Kettenbach) pay you for them (the claims)?

A. He didn't pay me anything for them.

Q. What did he pay for the claims?

A. He paid these people \$200; they all got the \$200.

Q. You had already paid that according to your testimony.

A. No; I hadn't already paid that.

Q. Well, it was charged to your account, wasn't it?

A. Well, I don't know whether it was or not.

Q. You had given your checks for it?

A. Well, I had given my checks; yes.

Q. And they were paid—the checks were paid—and they were returned to you, charging

the same as any other checks you drew on the bank, were they not?

A. Yes, sir (p. 1827).

Q. Then they must have been charged up to your account, were they not?

A. Well, this money wasn't paid finally until the land was deeded over to Kester and Kettenbach. * * *

Q. Well, now, then, how did you get your money back; how was your settlement made?

A. I didn't get my money back.

Q. How was your settlement made?

A. The settlement was made when the—I don't know how they did make the settlement. I never paid any attention to my checks afterwards. I supposed they straightened those things up themselves (p. 1827).

So in the fall of 1905 Harvey J. Steffey engaged in the timber business with Dwyer, Kester, and Kettenbach, and for the funds with which to pay the expenses incident to initiating the entries before mentioned and furnishing the entrymen the amount of money for final proof, Steffey, on different occasions, acting upon the instructions of Kester, Kettenbach, and Dwyer, drew his checks upon the Lewiston National Bank when there was not a sufficient credit balance in his account to pay the same. The payment of these checks created overdrafts in the account, and from time to time Steffey gave notes, to cover the overdraft, which were returned to him after the entrymen, who had been located, had conveyed the claims to Kester and Kettenbach. Steffey did not pay these notes, but they were afterwards taken up by Kester and Kettenbach.

The following is a description of the aforementioned notes given by Steffey in renewal of notes given to cover said overdrafts:

Number.	Date.	Time.	Interest.	Amount.	Page.
			<i>Per cent.</i>		
15888	Dec. 29, 1906	Demand.....	10	\$1,311. 00	3753
15937	Jan. 17, 1907	Demand.....	10	1,000. 00	3754
16051	Apr. 2, 1907	Demand.....	10	350. 00	3754
16055	Apr. 4, 1907	6 months.....	10	700. 00	3754
16197	July 6, 1907	3 months.....	10	300. 00	3755
				3. 661. 00	

The aggregate of these five notes is \$3,661, and the interest computed upon them December 28, 1907, amounted to \$318. The total amount of the notes and interest is \$3,979 (p. 3755). On December 28, 1907, each of these said notes was paid at the bank, and the total amount charged to the land account of Kester and Kettenbach (pp. 3757, 3755). This explains how Steffey's settlement with the bank was made, and also explains why in reply to that inquiry he gave the not wholly intelligible and apparently evasive answer, "The settlement was made when the—— I never paid any attention to my checks afterwards. I supposed they straightened those things up themselves." The fact is he knew nothing about the account, and they straightened it up to suit themselves.

THE CHARLES S. MYERS ENTRY.

Charles S. Myers, husband of Janie Myers, entered a timber claim October 30, 1905 (p. 603). This is the Thornberg claim that Dwyer had contested, but Myers does not know how the relinquishment was

obtained (pp. 604, 1443, 1444). At that time he had resided at Fraser, Idaho, for 14 years. Myers told Steffey he would not mind taking up a claim, but that he didn't have any money. Steffey told him he could get him a claim,—that it wasn't a very good one, but that he could make \$150 out of it. Steffey said he would let him have the money to enter the claim and to pay all his expenses (p. 605). Steffey gave him \$20 to pay his expenses to Lewiston and return and to pay his filing fees at the land office (pp. 605, 606). The original agreement between Steffey and Myers before the latter filed was that Steffey was to let him have the money to purchase the land, and, in compliance with this agreement, Steffey met Myers at Lewiston the day Myers was to make proof and gave him something over \$400.00, and that is the money with which Myers made proof immediately thereafter (p. 608). Myers made proof January 22, 1906 (p. 604). He executed a deed conveying title to said claim to Kester and Kettenbach, March 12, 1906 (pp. 614, 618), and Steffey then gave him \$150.00 (p. 613). The whole transaction turned out just as Myers understood it would from the arrangement he had with Steffey when they first talked of taking up a claim (p. 613). Myers would not have sold the claim to any one else without giving Steffey a chance to buy it. He felt under obligations to Steffey and that he had a prior right (pp. 613, 614). Steffey says that before Myers filed and before he took him to the claim, he told Myers he would give him \$150.00 if he would enter a claim and convey it to whomsoever he would designate; that Myers agreed to this and Steffey then furnished him the money for his

expenses to Lewiston and the filing fee. (Steffey paid for publication personally) (pp. 1756, 1757); gave him the money with which to purchase the land (p. 1758); and had Myers execute the deed to Kester and Kettenbach and gave him \$150.00 in accordance with the agreement he had with him before he entered the claim (p. 1760).

THE JANNIE MYERS ENTRY.

Jannie Myers, wife of Charles S. Myers, made a timberland entry March 19, 1906 (pp. 620, 624). She testified that Steffey was at her home one day four or five months before she filed, and they talked about taking up a claim, and she asked him if he could get her one. She did not have any money with which to purchase a claim. The matter was discussed at home, however, as to the way by which her husband had gotten his claim, and the arrangements he had with Steffey, and she wanted to get a claim in the same way (pp. 621, 622). Steffey accompanied her to Lewiston and to the land office when she filed (p. 623). At the date for final proof, Steffey again went to Lewiston with Mrs. Myers. She does not know who paid the expenses of this trip, but thinks her husband had an understanding with Steffey that Steffey was to pay all the expenses and furnish the money to take up the claim, and it was her understanding that she was to take up a claim under the same conditions her husband did (pp. 625, 626). She made proof June 6, 1906 (p. 624), and paid \$200 in the land office at that time. "Q. Where did you get that money? A. Well, I don't remember now where I did get it; I think I had part of it myself. Q. Whom did you get the rest from? A.

I think from Mr. Steffey.” She did not give Steffey a note for the money furnished, nor did she pay any interest. She signed a deed dated July 11, 1906 (pp. 627, 630), presented to her by Steffey and Dwyer, conveying the claim to Kester and Kettenbach (p. 628). Shortly afterwards, Steffey paid her \$125.00. “Q. And is that what you understood he was to give you when you entered the claim? A. Well, there wasn’t any understanding just how much I was to get. Q. Was it approximate how much you would get? A. He thought about that—that I could get” (p. 629). The entire transaction turned out just as she understood it would at the time she had her first talk with Steffey about the claim (p. 630). Steffey testified that he had an arrangement with Jannie Myers that he was to locate her on a timber claim, pay all of her expenses, and she was to convey the claim to whomsoever he told her, and he guaranteed that she would make \$150.00 (pp. 1762, 1761). Steffey had a Mr. Gaffney locate Mrs. Myers; Steffey gave her \$10 to pay the expenses from home to Lewiston when she filed (p. 1763); he had her filing papers prepared and paid the fee for the same (p. 1763). When Mrs. Myers went to Lewiston to make proof, Steffey again met her, and gave her \$250.00 with which to make proof and to pay for the land (the claim was 80 acres) (p. 1765). Steffey had her execute a deed for the claim to Kester and Kettenbach, and afterwards he paid her the balance of the money for her claim, making \$150.00 in all (p. 1766).

As to this entry (and the other entries forming the Steffey group), the court said: “I am convinced by the circumstances of the case and the admitted conduct

of the parties that they all made the entries with the understanding both upon their part and upon the part of Steffey that, upon issuance of final certificate, for a definite consideration, they should convey the land to anyone whom Steffey might designate" (p. 350). The court held, however, that Kester and Kettenbach, in purchasing the titles from the entrymen, acquired the same as innocent purchasers.

THE MARY A. LONEY ENTRY.

Mary A. Loney, who made a timber and stone filing March 23, 1906 (p. 2724), is the wife of Charles E. Loney and sister of Effie A. Jolly, Janie Myers, and a sister-in-law of Clinton E. Perkins (p. 2717). She testified that at the time she talked with Steffey about taking up a claim she did not have the money with which to purchase one, nor did she know where she was to get the money. Charles Myers had explained to her the manner in which he had taken up his timber claim, and about the time that she went to view the claim Steffey told her and Mrs. Jolly that he would get the money for them and about what they would get out of their claims. He told them they would get between \$200 and \$250 (p. 2721). At the first conversation she had with Steffey, he said he couldn't make an agreement to buy the land (p. 2722). She does not know what brought about this conversation, as she never asked him to make an absolute agreement. She thinks she had heard that Steffey and Dwyer were in the locating business together. Mrs. Jolly and Mrs. Loney went to view the land together, and later they went to Lewiston with Steffey and filed on the claims (p. 2723). Steffey

furnished most of the money to pay the expenses of Mrs. Jolly and Mrs. Loney to Lewiston when they filed. At Lewiston Steffey gave them the money for filing fees before they filed (p. 2724). Steffey went to the land office with them and either paid the filing fees or gave the money to them for that purpose (p. 2725). Before Mrs. Loney went to Lewiston to file, Steffey told her he would furnish the money for all the expenses and would furnish the money for final proof. Mrs. Jolly and Mrs. Loney again went to Lewiston together to make their final proof. They met Steffey at the land office. Steffey gave Mrs. Loney \$400 or \$450 with which to make proof. She thinks at that time he also gave her the money to pay her expenses incurred in going to Lewiston. She thinks he also gave her the money for Mrs. Jolly at the same time. Mrs. Loney made proof with the money Steffey had given her. She did not give him a note for the money he had furnished, nor did she pay any interest (pp. 2726, 2727). Mrs. Loney made proof December 3, 1906 (p. 2736). She executed a deed conveying the title to her claim to Kester and Kettenbach, February 28, 1907 (p. 2737). She never returned to Steffey the money he had furnished her and he never asked her for it. She had received various amounts of money from Steffey between the time she made the proof and the time she signed the deed. Mrs. Loney received about \$225 from Steffey for the claim. After the first conversation, in which Steffey said she would get \$200 out of the claim, she does not know that there was anything said relative to the amount she was to get (pp. 2730, 2731). And when the sum Steffey had given her amounted to over \$200, she considered that

she had conformed to her part of the arrangement and that he had completed his. The whole transaction turned out as she expected it would from the first time she had talked with Steffey relative to taking up the claim. She had heard Mr. and Mrs. Myers say they had sold their claims to Steffey (pp. 2731, 2732). When she went to view the land, she had in mind that Steffey would tell her to whom she was to convey her claim (p. 2733). She thought that either Steffey or some one he represented would get the land (p. 2733). If she hadn't intended to convey the land to Steffey, or to some one whom he represented, she would not have taken it up; she could not have made the entry (p. 2735). It was only the arrangement that she had with Steffey that made it possible for her to take up the timber claim (pp. 2735, 2736).

THE EFFIE A. JOLLY ENTRY.

Effie A. Jolly, wife of James T. Jolly, sister of Jannie Myers, sister of Mary A. Loney, and sister-in-law of Clinton E. Perkins, made a timberland entry March 23, 1906. At that time she resided at Fraser, Idaho (pp. 2689, 2690, 2706). She testified that at the time she and her husband took up the timber claims, neither of them had the money to pay for the claims, and Steffey knew their circumstances as well as they did (pp. 2691, 2692). They sent word to Steffey by Myers that they wanted him to get them a claim. Several weeks later Steffey showed them the claims. Steffey said he would pay all the expenses, which he did. He went to Lewiston with Mrs. Jolly and Mrs. Loney when they filed, and paid part of the expenses of that journey.

He gave the money to Mrs. Loney and out of that she gave Mrs. Jolly the money for her expenses (pp. 2692, 2693). There was nothing said as to what they would do with the claims, but that they had it in their minds what they would do with them. Mrs. Jolly supposed that Steffey would get her claim when he was ready for it. She knew that Steffey was dealing in timber claims (pp. 2693, 2694), and she expected that sooner or later he would get her claim, and that was one of the reasons that she entered the claim (pp. 2694, 2695). Steffey accompanied them to Lewiston and went to the land office with them when they filed. Steffey gave them the money to pay the filing fees before they filed. Steffey told them they would get \$200 apiece out of their claims (pp. 2697, 2698). That price was agreeable to Mrs. Jolly (p. 2699). On the day she made proof she met Steffey at Lewiston and he gave her \$412, and with that money she made proof and purchased the land. She didn't give him a note as evidence of that indebtedness, nor did she pay any interest on the money, and nothing was said about when the money was to be repaid (p. 2700). She executed a deed to Kester and Kettenbach February 28, 1907 (pp. 2700, 2706). The amount she was to get for the claim was not discussed at that time, nor was anything said about it between the time that she first talked with Steffey before filing and then (pp. 2700, 2701). She received the money Steffey was to give her and various amounts at different times, and after she made the deed, he sent her \$50, which was the balance due her (p. 2704). When she received this \$50, it was her understanding, that she had concluded her part of the agreement and Steffey

had concluded his. The whole matter turned out as she understood it would at the time she went to view the land (p. 2705). In all she was to receive just about \$200 from Steffey, over and above expenses (p. 2711). On recross-examination, Mrs Jolly testified as follows: "Q. And if anyone had sent the deed there to Mr. Todd, and they had the money to turn over for the land, you would have sold to him, would you not? You would have felt justified in signing the deed? A. Well, there was nothing said to that part, as to who we were to sell to, or anything about it; but I suppose we really felt under obligations to sell to them. Mr. Gordon: Q. To sell to who? A. Oh, to the Kettenbach and Kester, I suppose, that we did sell to. They located us. Mr. Tannahill: Q. Well, they had nothing to do with locating you, did they? A. No, sir. Q. And when he located you, Steffey never said anything about having any business relations with them, did he? A. No, sir, he didn't. Q. And the fact of the matter was that they had nothing to do with the locating of you on the land, or with furnishing you the money, so far as you know? A. Well, I couldn't tell about that—not that I know of" (pp. 2715, 2716). Mrs Jolly further said that she felt under obligations to Steffey to give him a preference right to buy the land (p. 2716).

Steffey said that Mary A. Loney and Effie A. Jolly had adjoining claims and were located together (pp. 1773, 1774). He guaranteed them \$200 above all expenses, and led them to think he would furnish all the money. Steffey paid the expenses of the trip of Mrs. Loney and Mrs. Jolly to the timber and also of

the trip they made to Lewiston to file. Steffey also paid the fee for preparing their filing papers, the filing fee, and for publication. Steffey accompanied them to Lewiston when they made final proof. He paid their railroad fare and all other expenses. On the day they made proof, Steffey gave them \$450 apiece for that purpose (pp. 1775, 1776). Steffey secured the deeds from Mrs. Loney and Mrs. Jolly conveying their claims to Kester and Kettenbach (p. 1778). At that time, he gave them the balance that was due them, between \$25 and \$50 apiece. The amounts he paid each of them would aggregate \$200 apiece. He did not talk to either of the entrywomen as to how much they were to get other than the first time that he broached that subject to them before entry, and when they executed the deeds, it was under the original arrangement he had with them, and nothing was said at that time as to how much they were to get (p. 1779). The procurement of Mrs. Loney and Mrs. Jolly to enter the claims, and the conveyance to Kester and Kettenbach, were in accordance with the original agreement Steffey had with Dwyer, and the conveyance by Mrs. Loney and Mrs. Jolly to Kester and Kettenbach, was the carrying out of the agreement they had with Steffey before they entered the claims (p. 1782). On December 4, 1906, Steffey gave Mrs. Jolly and Mrs. Loney each a check for \$50, said checks were paid December 18, 1906, and on February 28, 1907, the day that each executed the deed to Kester and Kettenbach, Steffey gave each of them a check for \$25 (pp. 1780, 1781, 1782.)

THE CHARLES E. LONEY ENTRY.

Charles E. Loney, entered a timber claim April 3, 1906 (p. 2751). He is a brother-in-law of Charles S. Myers. He testified that Myers told Loney that Steffey was locating him and his wife on timber claims and that he (Myers) had gotten the money to take up his claim through Steffey. Loney and Jolly went to view the claims together. At that time Steffey told them that he would furnish all the expenses, and he (Loney) supposed he was to get the money for final proof through Steffey (pp. 2746, 2747). Steffey took Loney to view the claim and paid his expenses to Lewiston when he filed. Steffey gave Loney \$10 and told him to divide that with Jolly for that purpose. Before he went to the land office the first time Steffey told him he would furnish him with money to make his final proof; that he wouldn't have taken the claim if Steffey had not told him that (p. 2748). Before he went to view the claim, he understood from Steffey that he and Jolly were to get between \$200 and \$250 each out of the claims. He got this understanding from Steffey. It was his understanding that the land was either to go to Steffey or to some one he represented. "There wasn't but very little said. I just drewed an idea from what he said." He guessed it was the policy to say as little about it as possible (pp. 2748, 2749). Loney said that before he filed the Sworn Statement, he understood he was to turn the land over to some one. He didn't know whom at that time. He thought Steffey would be the man who would tell him to whom he should deed it. He understood that Steffey wanted the claim and didn't know whom it was for, but understood that he

would take it. That was what he had in mind when he went to look at the claim (pp. 2750, 2751). And he intended to convey after final proof to Steffey, or to whomever he represented, in consideration of the \$200. Steffey went to the land office with him when he filed (p. 2751). On the day of making proof, Steffey gave him \$450 for that purpose, and that was the money he paid into the land office in purchasing the land (pp. 2753, 2754). He did not give Steffey a note for the money furnished him, nor did he pay any interest on the same, and nothing was said as to when the money should be repaid (p. 2755). Loney made proof June 19, 1906 (p. 2752). Steffey presented to him a deed, dated July 12, 1906, conveying the claim to Kester and Kettenbach, which he executed (pp. 2756, 2761). Nothing was said at that time about the price of the land, and when he signed the deed, he was acting under the original arrangement had with Steffey. Before then, Steffey had given him \$75; he gave him the balance afterwards. The last payment was \$50 (pp. 2756, 2757). There was never anything said about the price of the land between the time he had his first talk with Steffey relative to the claim, and the time he received the last \$50 (p. 2757). The whole transaction turned out just as he expected it would from the time he had his first talk with Steffey. Loney said he carried out his part of the understanding and Steffey performed his part of it (p. 2760). Though Loney had received the money from Steffey with which to purchase the land a few moments before making proof, he swore at the land office that the money he used for that purpose he had received from the sale of property that he owned (p. 3978).

THE JAMES T. JOLLY ENTRY.

James T. Jolly entered a timber claim April 3, 1906. At that time he resided at Fraser, Idaho. Mrs. Loney, Mrs. Myers, and Mrs. Clinton E. Perkins, deceased, are sisters of Mrs. James T. Jolly (pp. 2656, 2657, 2662). Jolly said that before entering the claim he had talked with his brother-in-law, Charles Myers, about taking up a claim (p. 2658). And at that time knew that his wife and that Mr. and Mrs. Loney and Mr. and Mrs. Myers had taken up claims and had gotten the money from Steffey for that purpose. Steffey at that time was living at the home of another sister of Mrs. Jolly, named Mrs. Gaffney. When Jolly first talked with Steffey about taking up a timber claim, he knew that he could make the same arrangement with him as the others had, and that neither Jolly nor his wife had any money with which to enter claims (pp. 2685, 2686). Before entering the claim, Jolly understood that he was to get the money from Steffey for that purpose, and he expected to get about \$300 out of the claim. "Q. From whom did you expect to get that? A. Through Mr. Steffey—from him." Steffey located Jolly, and Jolly, Loney, and Steffey went to Lewiston together at the time Jolly and Loney made their applications to enter the land. Steffey gave Loney \$5 to pay Jolly's expenses to Lewiston (pp. 2660-2661). Steffey had their filing papers prepared and furnished them the money for filing the same. Later Jolly and Loney went to Lewiston to make proof (pp. 2663, 2664). On that occasion Steffey met Jolly and Loney and he gave Jolly the amount that he had expended in going to Lewis-

ton and \$400 with which to make proof. With that money Jolly made proof and purchased the land the same day. Steffey instructed Jolly to state at the land office that he had borrowed the money from him, but Jolly testified before the land office that the money was his own, that he earned it freighting and hard labor. Jolly made proof June 19, 1906, and executed a deed conveying title to his claim to Kester and Kettenbach July 11, 1906 (pp. 2664, 2665, 2673). Jolly thinks that Dwyer presented the deed to him to sign, and no money was paid him at that time. Several days afterwards, Steffey gave him the balance of \$200.00, the amount which he was to receive. At the first talk Jolly had with Steffey he made arrangements for the taking up of the claims for himself and his wife, and though he did not at that time make an agreement with Steffey to convey the land to him, it was his impression that in view of the fact that he, Steffey, was to furnish the money, Jolly was to convey the claim to him after he made proof. It was his understanding that they were to take it off his hands and that was his impression when he first talked with Steffey about it; it was really a silent understanding that they had. When Jolly entered the claim, he intended to convey it to Steffey and he understood that he was to receive between \$250 and \$300 for it (pp. 2667 to 2669). When the deed was made and Steffey had given Jolly \$200, it was Jolly's understanding that he had performed his part of the agreement, and that Steffey had completed his. When Jolly signed the deed presented by Dwyer, nothing was said about the price to be paid for the land. He signed the deed at Dwyer's request and sent

it to Kester and Kettenbach, because he knew the relations that existed between Dwyer and Steffey, and he understood that in dealing with one that he was dealing with the other, and that Dwyer was the active agent for Kester and Kettenbach; he did not give Steffey a note for the money furnished him nor did he repay the same, and Steffey had never said anything to him about it since (pp. 2669 to 2672). Again Jolly said that it was understood that Steffey would take the land if they wished to let him have it. "Q. Was that the understanding you had when you first spoke to him about the timber claim? A. Yes, sir; that was the impression" (p. 2687). Jolly testified at the land office that the money with which he paid for the land he had earned by freighting and hard labor (p. 3966).

Steffey testified that he located Charles E. Loney and James T. Jolly upon an agreement made between them before either Loney or Jolly went to view the land, that he would furnish them with the money necessary to enter and purchase the claim, pay all their expenses, and guarantee that they would get \$200 apiece over and above all expenses out of their claims (pp. 1783 to 1785, 1787). Loney and Jolly were located together and went to Lewiston to file at the same time, Steffey paid the expenses of the journey from their home to Lewiston, had their filing papers prepared for them, and paid the fee for that service. He gave them the money for filing fees and personally paid for publication (pp. 1785, 1786). On the day of final proof, Steffey met them at Lewiston by agreement and gave each of them \$450 with which to make proof (p. 1787). He obtained the deeds from them to Kester and Kettenbach and

paid them the balance that was due. In all, he gave each of them \$200 over and above what he had furnished them to take up their claims (p. 1789).

THE CLINTON E. PERKINS ENTRY.

Clinton E. Perkins, who resides at Fraser, Idaho, made a timber land entry April 19, 1906 (p. 817). Perkins testified that before applying to enter the land, he had a talk with Steffey at Perkins' home, and Steffey told him that he could locate him on a claim that was not a very good one but that he could make a couple of hundred dollars out of it over and above expenses (pp. 819, 820). He told Steffey that he didn't have the money to pay for a claim; Steffey told him that he would furnish the same (p. 820). Perkins did not even have the money to pay his expenses to Lewiston at the time of filing. Steffey accompanied Perkins to Lewiston when the latter went to file, and Steffey paid his railroad fare from Fraser to Lewiston and return, the hotel expenses while at Lewiston, the filing fee, and the fee for publication. "Q. Now, tell exactly what Mr. Steffey informed you, you would have to do to make the \$200. A. Well, he told me that he was satisfied he could sell the land and I could get \$200 over and above expenses. He said he positively couldn't make a bargain with me, but as far as he was concerned he was a friend of mine and he was satisfied he could get me that much money." That was before Perkins filed. Perkins did not know to whom he was to sell the claim, but he felt in duty bound to sell it to Steffey as he had depended on Steffey (pp. 820 to 826). On the day of final proof, Perkins met Steffey

at Lewiston by appointment. Steffey gave him \$400 with which to make proof and was one of his witnesses. On the same date, Perkins collected \$400 from another source. Perkins said that at the land office he had Steffey's \$400 in one pocket and his own in another and that he made proof with his own money. In reply to the question why he took the money from Steffey if he had money of his own, Perkins said, that the money he had of his own he owed and couldn't afford to have tied up. He didn't give Steffey a note for the money nor did he pay interest on the same (pp. 825 to 829). If he had not received the \$400 from Steffey that day, thinks he would not have made proof; that he would have thrown the whole thing up. After he made proof, Perkins said Steffey gave him another \$100. He guessed it was because he, Perkins, needed it (pp. 829, 830). From the first conversation Perkins had with Steffey, he felt that he should sell the property to him, because he had depended upon him and he had advanced the money. He would not have sold the property to anyone else and he would not have entered the claim at that time if he had not depended upon Steffey. Sold the claim through Steffey to Kettenbach (p. 831). Perkins made proof July 12, 1906 (p. 819) and executed a deed dated September 4, 1906, conveying title to his claim to Kester (p. 833). After the deed was signed, Steffey gave him the balance of the \$200, so the whole matter turned out just as he had thought it would from the start. He received what Steffey had told him he would get and he had no complaint whatever to make. He felt that Steffey had carried out his obligation and that he had concluded his (p. 832).

Steffey testified that before locating Perkins, he had an agreement with him, that Perkins would enter a claim and deed the title to the same to whomsoever he designated for \$200 over and above expenses (p. 1789). Steffey paid Perkins's expenses from Fraser, Idaho, to Lewiston, when the latter made his application to file, also gave Perkins the money to pay filing fees and Steffey paid publication personally. On the day that they made proof Steffey gave him \$400 for that purpose (pp. 1791, 1792). Perkins later conveyed the claim to Kester and Kettenbach. Steffey then gave him \$70, being the balance of the \$200 that Steffey was to give Perkins (p. 1793).

THE FRANK J. BONNEY ENTRY.

Frank J. Bonney made an entry June 27, 1906 (p. 810). Bonney said that Steffey located him on a timber claim but did not charge him a location fee. Steffey told him that the claims were nearly all gone and this one was not much good but if he entered it, he (Steffey) would sell it so that Bonney could make a couple of hundred dollars out of it; thinks Steffey told him he would guarantee him that much. After he had been over the land with Steffey, Bonney went to Lewiston and filed. Steffey gave him the money on two occasions but he does not remember whether this was one of them. Steffey gave him some money but Bonney does not state what it was for; supposes Steffey thought he was short. At final proof Steffey gave him some more money, \$300 or \$400. When Steffey gave him the money he said, "You will probably need a little money." Bonney said that nearly all the money he

used in making proof was his (pp. 796 to 806). "Q. And did you take the money which he gave you and go back in the land office and make proof? A. Let's see. I went down the street some place and then went back up in the land office. Q. And did you make the proof? A. Yes, sir. Q. And did you give them the money that Steffey gave you? A. Well, sir, I had nearly enough money and used a little of that * * *. Q. And what did you do with the rest of it? A. Why, I hung on to it. * * * Q. Didn't Steffey give you that money to make final proof? A. Well, I suppose that is what he intended to do. Q. And didn't you make your final proof with part of that money? A. No, sir, not all of it; I had nearly enough money to make it myself" (pp. 805, 806). "Q. Well, why did you take Steffey's money? A. Well, just like everybody else; they was taking all they could get hold of." * * *

"Q. How did you expect to make proof that day if you hadn't met Steffey? A. Well, I thought maybe I could raise a little money down here." * * *

After Bonney said that he did not pay Steffey anything for his services, he testified as follows: "Q. You were not paying him anything for it, were you? A. No, sir. Q. And why was he guaranteeing you that you could sell it? A. I don't know. Q. Did he give you the \$200? A. Yes, sir" (pp. 806, 807). Bonney did not give Steffey a note for the \$400 nor did he pay him interest on the same, and he did not tell Steffey when he would repay the money. "Q. As a matter of fact, the whole transaction turned out as you expected it would when you had the first talk with Steffey. Is this correct? A. I got my \$200." After Steffey had given

him \$20 at one time and \$400 at another, Bonney thought it wouldn't have been right to sell the land to anybody else as long as Steffey had made the proposition that he thought he could sell it, had shown him the claim, and had let him have the money (p. 808). Bonney made final proof October 11, 1906 (p. 811). He executed a deed conveying the claim to Kester and Kettenbach December 20, 1906 (p. 811). Steffey said that he located Bonney pursuant to an agreement that he had with him before he filed on the claim, that he would locate him, furnish him the money for all expenses and to pay for the land, and that Bonney would get \$175 out of the claim; that as a part of the agreement Bonney was to deed the title of the claim to whomsoever Steffey designated (p. 1793).

RECORDS OF BANK SHOWING RELATIONS BETWEEN KESTER, KETTENBACH, AND STEFFEY IN REGARD TO STEFFEY GROUP.

Steffey did draw his checks on said bank, and when overdrafts were created later gave his notes for the same.

From a comparison of the dates upon which the notes were given and the dates they were either paid or renewed, with the dates of the final proofs and the deeds of entrymen of the Steffey group, it is evident that Steffey was using his bank account in the interest of Kester and Kettenbach and that Kester and Kettenbach were using the funds of the bank through Steffey in the acquisition of these timberlands for themselves; and that almost a year after the last of the Steffey entrymen had conveyed to Kester and Kettenbach their claims, Kester and Kettenbach paid the Steffey notes that remained in the bank.

HARVEY J. STEFFEY'S NOTES.

Date.	Number.	Amount.	Time.	Interest.	Paid.
1906.				<i>Per cent.</i>	
Jan. 22	15263	\$500.00	90 days.....	10	His account not credited amount of note. Paid Mar. 23, 1906, and his account charged amount of note and interest.
Jan. 23	15265	1,200.00	Demand....	10	Paid Dec. 29, 1906. His account not charged but a renewal note for \$1,311.00 given.
Feb. 24	15323	50.00	Demand....	10	Amount of note credited to his account and paid Mar. 28, 1906.
June 12	15477	900.00	90 days.....	10	Amount of note credited to his account and paid by a renewal note for \$949.00 Dec. 29, 1906.
June 19	15498	1,000.00	Demand....	10	Amount of note credited his account. Paid July 12, 1906. Not charged to his account and no record of how note was paid.
Aug. 6	15591	300.00	Demand....	10	Amount of note credited to his account and renewed Dec. 29, 1906, by a note for \$312.00.
Sept. 11	15648	300.00	Demand....	10	Paid Oct. 12, 1906. Neither credited nor charged to his account. No record of how paid.
Dec. 29	15888	1,311.00	Demand....	10	This note is a renewal of note of Jan. 23, 1906, No. 15265, for \$1,200.00 and \$111.00 interest. Paid Dec. 28, 1907, and not charged to Steffey's account.
Dec. 29	15889	949.00	Demand....	10	This note was given in renewal of note dated June 12, 1906, No. 15477, in sum of \$900.00 and \$49.00 interest.
Dec. 29	15890	312.00	Demand....	10	Amount of note credited Steffey's account. Both of said notes paid Mar. 11, 1907. The two notes with interest amounted to \$1,286.00. The records of the bank do not show who paid these notes and on the day before, to wit, Mar. 9 and 10, Steffey's account was overdrawn \$263.26. On Mar. 11 his account was charged with a check for \$25.00 and on the same date his account was credited \$563.80, leaving a balance of \$275.54 at the close of business Mar. 11, 1907.
1907.					
Jan. 17	15937	1,000.00	Demand....	10	Credited to Steffey's account. Paid Dec. 28, 1907; not charged to his account.
Apr. 2	16051	350.00	Demand....	10	Paid Dec. 28, 1907. Steffey's account not charged amount of note or interest.
Apr. 4	16055	700.00	6 months....	10	Credited Steffey's account. Paid Dec. 28, 1907. His account not charged.
July 6	16197	300.00	3 months....	10	Credited Steffey's account. Paid Dec. 28, 1907. His account not charged.

As has been hereinbefore shown, on December 28, 1907, the following of the above-mentioned notes were paid, with interest, by Kester and Kettenbach, each paying one-half thereof:

Number.	Date.	Amount.	Interest at 10 per cent.
15888	Dec. 29, 1906.....	\$1,311.00	\$131.00
15937	Jan. 17, 1907.....	1,000.00	95.50
16051	Apr. 2, 1907.....	350.00	26.00
16055	Apr. 4, 1907.....	700.00	51.40
16197	July 6, 1907.....	300.00	14.00
		3,661.00	318.00—\$3,979.00

At that date Steffey had no account with the Lewiston National Bank, said account having been closed out November 23, 1907.

The ledger of the Lewiston National Bank shows that on December 27, 1907, the account of Kester and Kettenbach was overdrawn \$171.22; that on the following day, December 28, 1907, a deposit was made in said account of \$4,200.00 and one check in the sum of \$3,979.00 charged to that account, leaving a balance of \$49.78; that on December 28, 1907, a check in the sum of \$2,100.00 was charged to the individual account of George H. Kester, and a check in the sum of \$2,100.00 was charged to the individual account of Wm. F. Kettenbach (pp. 3752 to 3758).

The following is a table showing the dates of application to enter made by each of the Steffey entrymen, the dates of final proof, and the dates of the deeds from the entrymen to Kester and Kettenbach:

Name.	Date sworn statement.	Date final proof.	Deed.
Charles S. Myers (pp. 603, 604)...	Oct. 30, 1905	Jan. 22, 1906	Mar. 21-26, 1906 (pp. 614, 1444).
Janie Myers (p. 630).....	Mar. 19, 1906	June 6, 1906	July 11-28, 1906 (p. 631).
Mary A. Loney (p. 2736).....	Mar. 23, 1906	Dec. 3, 1906	Feb. 28 and Mar. 4, 1907 (p. 2737).
Effie A. Jolly (p. 2706).....	Mar. 23, 1906	Dec. 5, 1906	Feb. 28 and Mar. 4, 1907 (p. 2707).
Charles E. Loney (p. 2760).....	Apr. 3, 1906	June 19, 1906	July 11-28, 1906 (p. 2761).

(All of said claims were entered after Steffey had had the Charles S. Myers claim conveyed to Kester and Kettenbach.)

Name.	Date sworn statement.	Date final proof.	Deed.
James T. Jolly (p. 2672).....	Apr. 3, 1906	June 19, 1906	July 11-27, 1906 (p. 2673).
Clinton E. Perkins (p. 832).....	Apr. 19, 1906	July 12, 1906	Sept. 4-10, 1906 (p. 833).
Frank J. Bonney (p. 811).....	June 27, 1906	Oct. 11, 1906	Dec. 20-24, 1906 (p. 812).

From the foregoing abstract and table it will be observed that at the date of the first note of which mention is made, January 22, 1906, in the sum of \$500.00, Charles S. Myers made his final proof and purchased the land, and though this note was given for ninety days it was paid and Steffey's account charged the amount of the note and interest March 23, 1906, two days after the date of the deed from Myers to Kester and Kettenbach, and before said deed was recorded, and while the note still had thirty days to run.

The Charles S. Myers entry was the first of the Steffey group of entries to be made. He entered the claim of Thornberg that Dwyer had contested and Myers had been furnished the relinquishment. None of the other entries composing this group were initiated until the time that Myers conveyed his claim to Kester and Kettenbach. As has been shown, the deed of Myers is dated March 21, 1906. Two days before, i. e., March 19, 1906, Janie Myers, his wife, filed an application at the land office to enter her claim; and on the day that Steffey had the settlement with Kester and Kettenbach relative to Myers's claim and the taking up by Steffey of his note given when Myers made proof, to wit, March 23, 1906, Mary A. Loney and Effie A. Jolly, sisters-in-law of Myers, filed their applications to enter at the land office. This evidence corroborates Steffey's testimony of the relations that existed at that time between him, Dwyer, Kester, and Kettenbach.

On June 19, 1906, the fifth note above mentioned (No. 15498) was made by Steffey in the sum of \$1,000.00

and payable on demand; the day that this note was given Charles E. Loney and James T. Jolly made proof on their claims and paid the purchase price for the same, and these two entrymen, together with Janie Myers, conveyed their claims to Kester and Kettenbach July 11, 1906, and on the following day said last-mentioned note was paid and Steffey's account charged the amount of said note and interest.

The latest of these claims acquired by Kester and Kettenbach were the Mary A. Loney and the Effie A. Jolly entries, which were conveyed to Kester and Kettenbach February 28, 1907. At the date of the deeds to these claims, Steffey had three demand notes at the Lewiston National Bank, i. e.—

	Date.	Amount.
No. 15888.....	Dec. 29, 1906.....	\$1,311.00
No. 15889.....do.....	949.00
No. 15890.....do.....	312.00

The latter two notes were paid March 11, 1907. The records of the bank do not show who paid those notes and Steffey's account was not charged the amount of the notes, but on the morning of that day Steffey's account was overdrawn \$263.26 and at the close of business that day said two notes had been paid and Steffey had a balance to his account of \$275.54. Evidently there was some sort of a settlement on that date between Kester, Kettenbach, and Steffey relative to the two claims last mentioned.

As before shown, five notes and interest amounting to \$3,979.00 were paid by Kester and Kettenbach. On the day of the payment of these notes the joint account of Kester and Kettenbach was overdrawn, but on that

day they each deposited a check in the sum of \$2,100.00 to their joint account, and a check in the amount of said note and interest was on the same day charged to said account.

It would seem most improbable that Kester and Kettenbach, having formerly been officers of the bank and having been relieved of their positions by reason of having been convicted and sentenced for criminal conduct in connection with the land transactions involved in these suits, would pay that number of notes of the amounts mentioned, of another person unless said notes had been given for their use and benefit or unless they were personally responsible for them, and especially after they had been retired from the bank for six months.

In explanation of this transaction Mr. Kettenbach said that Frank W. Kettenbach (who had succeeded him as president) was not satisfied with the Steffey notes, "and Mr. Kester and I told him that if he wasn't thoroughly satisfied with that paper he could charge it to us, that we would take it up, we would buy it of him. * * * And Mr. Kester and I agreed to purchase the paper from the bank. We did it just the same as anybody would purchase any paper; we bought the notes and paid for them and the settlement was made, I suppose, on that date and shows that the notes was paid for" (p. 3773).

The records of the bank show that these notes were *paid not sold*; that Steffey had no account with the bank at that time, his account having been closed the preceding November; that the \$1,311.00 note had been running for a year, and that it was given in renewal of

a demand note and the interest that had accrued thereon, dated January 23, 1906, about two years before and the day after Myers, the first entryman of this group, made proof, and said note was given for Steffey's overdraft created at that time; that two others of said notes were long past due, and the other two were demand notes that had run for about a year. All these notes were unsecured and under the circumstances they could not be considered even a safe investment. Moreover, it would seem rather improbable that Kester and Kettenbach at that time would purchase notes as an investment, or pay notes that they were not obligated to pay, when it is remembered that Kester, in order to straighten out his personal affairs, during the preceding five months, had given his notes to the Lewiston National Bank and the Idaho Trust Company in sums aggregating \$60,000.00 and that *two days after* the payment of said notes by him and Mr. Kettenbach, December 30, 1907, he borrowed from the Lewiston National Bank an additional \$20,000.00 and gave his personal note therefor, defendants' Exhibit E 2 (pp. 4189, 4184); and that on the same day that Kester gave the last-mentioned note Wm. F. Kettenbach borrowed from the Lewiston National Bank \$4,000.00 and gave his note for the same, defendants' Exhibit D 2 (p. 4188).

AFFIDAVITS OF ENTRYMEN IN STEFFEY GROUP.

The defendants introduced in evidence affidavits of four of the Steffey entrymen in which they made statements affirming the statements made in their original applications that their entries were not made pursuant

to a prior agreement, etc., and relating to entries of which they were about to negotiate a sale.

These affidavits appear in the record as defendants' Exhibits A, B, C, D, Y, Z, and A 1. With the exception of the difference in the names, dates, and descriptions, the affidavits are identical, a number of them being carbon copies of the others and their phraseology varying slightly from the affidavits they were required to make in their original sworn statements. The originals of these affidavits are on file in the office of the clerk of this court.

Steffey testified relative to said affidavits that, after the trials of some of the defendants at Moscow, Dwyer gave him a blank form of an affidavit and requested that he have the Steffey entrymen make an affidavit of similar import in order that the defendants might protect themselves as much as possible against any appearance of fraud, Dwyer explaining at the time that Mr. Borah had advised that such affidavits be gotten, as that was the way it was done in southern Idaho. Steffey then had some of the entrymen make the affidavits offered by the defendants, which are in the exact language as the copy of the affidavit furnished him (pp. 1799 to 1801).

All of them contained the clause "that the sale now being negotiated is not the result nor made in pursuance of any agreement, etc."

The affidavit of Charles S. Myers (defendants' Exhibit A) is dated December 21, 1906, while his deed conveying title to Kester and Kettenbach is dated nine months before, i. e., March 21, 1906; the affidavit of

Jannie Myers (defendants' Exhibit B) is dated December 21, 1906, while her deed to Kester and Kettenbach is dated five months prior thereto, i. e., July 6, 1906; the affidavit of James T. Jolly (defendants' Exhibit Z) is dated December 22, 1906, while his deed to Kester and Kettenbach is dated July 11, 1906; the affidavit of Clinton E. Perkins (defendants' Exhibit D) is dated February 28, 1907, while his deed to Kester and Kettenbach is dated September 4, 1906 (pp. 4120, 4162, 4122, 4124, 4159, 4161).

Therefore, at the dates of these affidavits there was no sale under negotiation for said claims, and considering the circumstances under which said affidavits were signed, as is shown by the testimony of Steffey and said entrymen on the subject, they are nothing more than the affidavits of persons desiring them, or of the person securing them, and are evidence of consciousness of guilt or guilty knowledge on the part of the defendants and a preparation on their part for securing of what they considered evidence in anticipation of the present cases, which were not filed until three years after the date of the affidavits.

The same observations apply to the affidavits of Charles W. Taylor (defendants' Exhibit E), Edgar H. Dammarell (defendants' Exhibit I), Edgar J. Taylor (defendants' Exhibit G), and David S. Bingham, dated January 21, 1907, January 22, 1907, November 30, 1906, and January 30, 1907, respectively, except that these affidavits were procured to be used at the criminal trials of the defendants in which the manner of the acquisition of said entries were involved, which trial

began in April, 1907, and all of these persons conveyed title to their claims to defendants in July, 1904 (pp. 4125, 4139, 4134, 4143).

HISTORY OF THE PLEADINGS AND BY WHOM AND HOW THE TITLES TO THE ENTRIES IN THE CASES ARE HELD.

The original bill of complaint in case No. 2209 was filed October 14, 1907, and involved all of the entries now contained in case No. 2209, as amended, and also in case No. 2210, with the exception of the entries of Cornell, Lambdin, Shaeffer, and Waldman, which were in suit for the first time in No. 2210 (pp. 3 to 29).

A notice of *lis pendens* was also filed on the date the original suit was filed (p. 1463).

The defendants attacked the bill by demurrer and an amended demurrer. The third ground of the amended demurrer was that the bill was unintelligible, indefinite, and uncertain in that it did not show that the land involved in the bill was ever transferred to the defendants or any of them, or that any part of it had ever been transferred from the original entrymen to the defendants or other persons, or that the defendants or any of them were at that time owners of the land or any part thereof; and demanded judgment on the amended demurrer (p. 35).

On November 7, 1908, the court made an order sustaining the demurrer on the third ground and granting complainant leave to amend (p. 42).

On April 23, 1909, the defendants in No. 2209 moved the court to dismiss the bill on the ground that the com-

plainant had failed to amend the bill. This motion was denied May 12, 1909, and the complainant was given until May 25, 1909, to amend his bill (pp. 47, 50).

On May 22, 1909, an amended bill in No. 2209 was filed, which involved the entries, the title to which was in the names of W. F. Kettenbach and Kester, either jointly or severally, made by the following-named entrymen (pp. 50 to 86):

Entries involved in No. 2209 as amended:

Incorporated in bill in case No. 2210 by a m e n d - ment (p. 4499).	{	Carrie D. Maris.	Robnett group.
		John H. Little.	
		Ellsworth M. Harrington.	
		Wren Pierce.	
		Benjamin F. Bashor.	
		Joseph B. Clute.	
		Francis M. Long.	
		John H. Long.	
		Bertsel H. Ferris.	
		George Ray Robinson.	
	{	Charles W. Taylor.	O'Keefe group.
		Jackson O'Keefe.	
		Edgar J. Taylor.	
		Joseph H. Prentice.	
		Fred E. Justice.	
		Edgar H. Dammarell.	
		Benjamin F. Long—Robnett group.	

The bills of complaint in cases numbered 2210 and 2211 were filed September 4, 1909, and notices of lites pendentes were filed the same day (pp. 4225 to 4285; 4575 to 4608; 1469, 1474).

The titles to all of the entries involved in suit No. 2211 are in the names of W. F. Kettenbach and Kester,

and the claims were entered by the following-named entrymen:

Charles S. Myers.	} Steffey group: (pp. 4575 to 4608).
Jannie Myers.	
Mary A. Loney.	
Effie A. Jolly.	
Charles E. Loney.	
James T. Jolly.	
Clinton E. Perkins.	
Frank J. Bonny.	

The claims involved in suit No. 2210 were entered by the following-named persons, and the titles of record to said claims are as follows (pp. 4225 to 4285):

Names of entrymen.	Title of record as follows:	
James C. Evans.....	{ James C. Evans to Kettenbach & Kester. Deed. Dated June 17, 1903. Recorded Aug. 10, 1903 (p. 1633). Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907 (p. 1719).	The Idaho Trust Co. took title to these entries without paying value therefor and with knowledge of the invalidity of said titles and now holds the title to these entries in trust for Kester & Kettenbach.
Lon E. Bishop.....	{ Lon E. Bishop to Kettenbach & Kester. Deed. Dated June 17, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1484).	
Frederick W. Newman..	{ Frederick W. Newman to Kettenbach & Kester. Deed. Dated June 17, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1506).	
Charles Dent.....	{ Charles Dent to Kettenbach & Kester. Deed. Dated June 23, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1485).	
Charles Smith.....	{ Charles Smith to Kettenbach & Kester. Deed. Dated June 23, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1511).	
George Morrison.....	{ George Morrison to Kettenbach & Kester. Deed. Dated June 26, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1503).	
Edward M. Hyde.....	{ Edward M. Hyde to Kettenbach & Kester. Deed. Dated June 26, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1496).	
Guy L. Wilson.....	{ Guy L. Wilson to Kettenbach & Kester. Deed. Dated July 13, 1904. Recorded June 24, 1907. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1519).	

Names of entrymen.	Title of record as follows:	
Daniel W. Greenberg....	{ Daniel W. Greenberg to Kettenbach & Kester. Deed. Dated Aug. 15, 1904. Recorded Jan. 24, 1906. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (pp. 1488, 1489).	The Idaho Trust Co. took title to these entries without paying value therefor and with knowledge of the invalidity of said titles and now holds the title to these entries in trust for Kester & Kettenbach.
David S. Bingham.....	{ David S. Bingham to J. O'Keefe. Deed. Dated July 26, 1904. Recorded Jan. 18, 1906. J. O'Keefe to Kettenbach & Kester. Q. C. deed. Dated July 30, 1904. Recorded Jan. 31, 1906. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907 (pp. 1482, 1483).	
Wm. E. Helkenberg.....	{ Wm. E. Helkenberg to Kester & Kettenbach. Deed. Dated Oct. 18, 1905. Recorded Nov. 11, 1905. Kester & Kettenbach to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (pp. 1494, 1495).	
Joseph B. Clute. (Amended, p. 449.)	{ Joseph B. Clute to Kettenbach & Kester. Deed. Dated June 17, 1903. Recorded Aug. 10, 1903. Kettenbach & Kester to the Idaho Trust Co. Deed. Dated July 6, 1907. Recorded July 10, 1907. At request Robnett (p. 1699).	
Wm. McMillan.....	{ Wm. McMillan to Kittie E. Dwyer. Deed. Dated Apr. 9, 1906. Recorded Apr. 9, 1906. Kittie E. Dwyer to the Idaho Trust Co. Deed. Dated Dec. 31, 1908. Recorded Jan. 4, 1909 (pp. 1501-1502).	The Idaho Trust Co. took titles to these entries without paying value therefor and with knowledge of the invalidity of said titles and holds the same in trust for Kester, Kettenbach, Dwyer, and Robnett.
Hattie Rowland.....	{ Hattie Rowland to Kittie E. Dwyer. Deed. Dated Apr. 9, 1906. Recorded Apr. 9, 1906. Kittie E. Dwyer to the Idaho Trust Co. Deed. Dated Dec. 31, 1908. Recorded Jan. 4, 1909 (pp. 1508, 1509).	
Van V. Robertson.....	{ Van V. Robertson to Lewiston National Bank. Deed. Dated Sept. 27, 1904. Recorded Oct. 10, 1904 (p. 1507).	Lewiston National Bank took title to said entries without paying value therefor and with knowledge of the invalidity thereof and now holds the same in trust for Kester, Kettenbach, Robnett, and Dwyer.
Drury M. Gammon.....	{ Drury M. Gammon to Robnett. Deed. Dated Oct. 9, 1903. Recorded Nov. 16, 1904. Robnett to Lewiston National Bank. Deed. Dated Nov. 25, 1904. Recorded Dec. 20, 1904. At request Robnett (pp. 1486, 1487).	
Robert O. Waldman. (See amendment, p. 449.)	{ Robert O. Waldman to Clarence W. Robnett. Deed. Dated May 26, 1903. Recorded Oct. 2, 1903 (p. 1637). Clarence W. Robnett to Elizabeth White. Deed. Dated July 8, 1907. Recorded July 8, 1907. Elizabeth White to Lewiston National Bank. Deed, Q. C. Dated Oct. 25, 1907. Recorded Oct. 28, 1907.	
Wm. B. Benton.....	{ Robnett to Lewiston National Bank. Q. C. deed. Dated Oct. 25, 1907. Recorded Oct. 28, 1907 (pp. 3694, 3695). Wm. B. Benton to C. W. Robnett. Deed. Dated Jan. —, 1902. Recorded Apr. 27, 1903. C. W. Robnett to Elizabeth White. Deed. Dated July 8, 1907. Recorded July 8, 1907. Elizabeth White to Clearwater Timber Co. Deed. Dated Sept. 4, 1907. Recorded Sept. 16, 1907 (pp. 1479 to 1481).	
Joel H. Benton.....	{ Joel H. Benton to Robnett. Deed. Dated Dec. 29, 1902. Recorded Apr. 27, 1903. Robnett to Elizabeth White. Deed. Dated July 8, 1907. Recorded July 8, 1907. Elizabeth White to Clearwater Timber Co. Deed. Dated Sept. 4, 1907. Recorded Sept. 16, 1907 (pp. 1477 to 1479).	The Clearwater Timber Co. took and now holds title to said claims knowing the entries to be invalid and voidable at the suit of the United States.
Pearl Washburn.....	{ Pearl Washburn to Jas. B. McGrane. Deed. Dated May 23, 1906. Recorded Nov. 9, 1906. Jas. B. McGrane to John E. Chapman. Deed. Dated May 8, 1907. Recorded June 6, 1907. John E. Chapman to Clearwater Timber Co. Deed. Dated June 7, 1907. Recorded June 21, 1907 (pp. 1513 to 1515).	

Names of entrymen.	Title of record as follows:	
Wm. and Alma Haevernick.	{ Wm. Haevernick and Alma Haevernick to Frank W. Kettenbach. Deed. Dated June 3, 1904. Recorded June 14, 1907. Frank W. Kettenbach to Clearwater Timber Co. Deed. Dated June 12, 1907. Recorded July 13, 1907 (p. 1490). Geary Van Artsdalen to Clearwater Timber Co. Deed. Dated Dec. 2, 1905. Recorded June 23, 1905 (p. 1512.)	{ The Clearwater Timber Co. took and now holds title to said claims knowing the entries to be invalid and voidable at the suit of the United States. Purchased while present case pending.
Geary Van Artsdalen...		
John E. Nelson.....	{ John E. Nelson to E. W. Thatcher. Deed. Dated May 18, 1908. Recorded May 20, 1908 (p. 1505).	
Soren Hansen (amendment).	{ (Will be mentioned later.)	
Wm. J. White.....	{ Wm. J. White to Elizabeth White. Deed. Dated Jan. 13, 1909. Recorded Jan. 15, 1909 (p. 1518).	{ Elizabeth White acquired and still holds title to said entries with knowledge of the invalidity thereof.
Mamie P. White.....	{ Mamie P. White to Elizabeth White. Deed. Dated Jan. 13, 1909. Recorded Jan. 15, 1909 (p. 1517).	
{ Edna P. Kester..... Elizabeth White..... Elizabeth Kettenbach... Martha E. Hallett.....	{ Still hold in trust for Kester, Kettenbach, Robnett, and Dwyer.	
Ivan R. Cornell.....	{ Ivan R. Cornell to Kettenbach & Kester. Deed. Dated Sept. 29, 1903. Recorded Oct. 10, 1903. Kettenbach & Kester to Potlatch Lumber Co. Deed. Dated Aug. 21, 1906. Recorded Oct. 9, 1906 (pp. 1971, 1972). Rowland A. Lambdin to Kettenbach & Kester. Deed. Dated July 22, 1902. Recorded July 8, 1903.	{ Potlatch Lumber Co. took title to and holds same with knowledge of fraud and invalidity of said entries.
Rowland A. Lambdin..	{ Kettenbach & Kester to Potlatch Lumber Co. Deed. Dated June 17, 1903. Recorded June 18, 1903.	
Fred W. Shaeffer.....	{ Fred W. Shaeffer to Kettenbach & Kester. Deed. Dated July 26, 1902. Recorded June 8, 1903. Kettenbach & Kester to Potlatch Lumber Co. Deed. Dated June 17, 1903. Recorded June 18, 1903 (pp. 1968 to 1970).	
Frances A. Justice.....	{ Frances A. Justice to Kittie E. Dwyer. Deed. Dated Mar. 30, 1906. Recorded Apr. 4, 1906 (p. 1497).	{ Kittie E. Dwyer holds in trust for Kester, Kettenbach, Dwyer, and Robnett.

SPECIFICATION OF ERRORS.

The assignment of errors in case No. 2209 is set out at page No. 4209 of the record; in case No. 2210, at page No. 4545; and in case No. 2211, at page 4706.

As the errors assigned in the three cases are numerous and are with slight variation the same in each case, we shall for the convenience of the court set out here only the substance of the errors relied upon.

I.

That the court erred in dismissing the bills of complaint in the three cases as to all the entries therein specified except the entries of Guy L. Wilson, Frances A. Justice, and Robert O. Waldman involved in case No. 2209, as to which said three entries the prayer in the bill of complaint was granted.

II.

That the court erred in not granting by decrees appropriate to that end the relief prayed in the bills of complaint as amended filed by the complainant in said cases.

III.

That the court erred in failing to find from the evidence in said cases that the defendants named in said bills of complaint as amended in each of said cases (the defendants mentioned in this connection in case No. 2209 are Kester, Kettenbach, Dwyer, and Robnett) had conspired among themselves, with each other, and with divers other persons named in said bills, and named and indicated in the evidence, to defraud the United States in the manner and for the purposes stated and charged in said bills of complaint as amended, and that the said defendants did so defraud the United States in such manner and in respect of the lands of the United States described in said bills.

IV.

That the court erred in finding and in holding that the evidence is insufficient to justify the cancellation of the patents to the entries of Fred E. Justice, Benja-

min F. Bashor, Wren Pierce, Frances M. Long, Benjamin F. Long, John H. Long, Ellsworth M. Harrington, John H. Little, Bertsel H. Ferris, George Ray Robinson, Edgar H. Dammarell, Joseph H. Prentice, Edgar J. Taylor, Charles W. Taylor, and Jackson O'Keefe, described and designated in the bill of complaint in case No. 2209; and that said entries are valid.

V.

That the court erred in finding and in holding that the evidence is insufficient to justify the cancellation of the patents to the entries of Edna P. Kester, Elizabeth Kettenbach, William J. White, Elizabeth White, Mamie P. White, Martha E. Hallett, Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith, James C. Evans, Joseph B. Clute, William B. Benton, Hattie Rowland, William McMillan, Pearl Washburn, Daniel W. Greenburg, George Morrison, Edward M. Hyde, John E. Nelson, Van V. Robertson, Soren Hansen, and David S. Bingham, described and designated in the bill of complaint in case No. 2210, and that said entries are valid.

VI.

That the court erred in finding and in holding that the titles to the lands designated and described in the bill of complaint as amended in case No. 2209, with the exception of the land described in the entry of Carrie D. Maris, were obtained from the United States in accordance with law and without fraud, and that said titles are valid in the hands of the defendants William F. Kettenbach and George H. Kester, and

that said defendants Kester and Kettenbach took title to the Maris entry as innocent purchasers, in good faith, for value, and without knowledge or notice of any fraud or illegality in the title to said land.

VII.

That the said court erred in finding that the defendant, the Lewiston National Bank, took the title to the land contained in the entry and claim of the said Drury M. Gammon described in the bill of complaint in case No. 2210, without any notice of its infirmity; and in holding in effect that the defendant, the Lewiston National Bank, purchased the land designated and described in said claim and entry under such circumstances as constituted the said defendant, the Lewiston National Bank, an innocent purchaser of the said land in good faith, for value and without knowledge or notice of any fraud or illegality in the title to said land.

VIII.

That the said court erred in finding that while the question whether the defendant, the Clearwater Timber Company, was an innocent purchaser was not entirely free from doubt that said company did not have such knowledge of the circumstances under which the entry and claim of Joel H. Benton was made, or such notice of the claims of the Government as to put it upon inquiry; and in holding in effect that the defendant, the Clearwater Timber Company, purchased the land designated and described in said claim and entry under such circumstances as constituted said defendant, the Clear-

water Timber Company, an innocent purchaser of the said land in good faith, for value and without knowledge or notice of any fraud or illegality in the title to said land; and in failing to hold that said company took the titles to the entries of Van V. Robertson and Drury M. Gammon, described in the bill of complaint in case No. 2210, with notice and knowledge of the invalidity thereof, and holds the same in trust for, and to the use of the defendants Kester, Kettenbach, Dwyer, and Robnett.

IX.

That the said court erred in failing to hold that the entries of William B. Benton and Pearl Washburn, designated and described in complainant's bill of complaint in case No. 2210 were entered in fraud of the laws of the United States, and are invalid, and that the defendant, the Clearwater Timber Company, now hold the title to said entries together with the entry of Joel H. Benton, hereinbefore referred to, and took the title to said entries with full knowledge and notice of the invalidity of said entries.

X.

That the said court erred in failing to hold, upon a finding of facts appropriate thereto and properly to be made upon the evidence herein, that the entries and claims of James C. Evans, Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith, George Morrison, Edward M. Hyde, Daniel W. Greenburg, David S. Bingham and William E. Helkenburg, William McMillan and Hattie Rowland, designated and

described in complainant's bill of complaint as amended in case No. 2210, were made and entered in fraud of the United States, and in fraud of the laws of the United States relating to such matters, and are invalid and voidable at the suit of the United States, and that the defendant, the Idaho Trust Company, which holds the title to the lands contained in said claims and entries, took title to the same with full notice and knowledge of the invalidity of said entries and claims and now holds the same, with the exception of the McMillan and Rowland entries, in trust for, and to the use of the defendants, Kester and Kettenbach, and the McMillan and Rowland entries it holds for the use and benefit of Kester, Kettenbach, Dwyer, and Robnett, all in the manner stated and charged in said bill of complaint.

XI.

That the said court erred in failing to hold that the entry of John E. Nelson, designated and described in the bill of complaint in case No. 2210, was made and entered in fraud of the laws of the United States and is invalid, and that the defendant, Elizabeth W. Thatcher, who now holds the title to said entry, took the same with full notice and knowledge of the invalidity of the title to said entry.

XII.

That the said court erred in failing to hold, upon a finding of facts appropriate thereto and properly to be made upon the evidence herein, that the claim and entry of Soren Hansen, designated and described in complainant's bill of complaint as amended, in case No.

2210, was made and entered in fraud of the United States and in fraud of the laws of the United States relating to such matters, and that the defendant, William F. Kettenbach, in whom the title to said claim and entry now vests took the same with full knowledge, notice, and information concerning the invalidity of said entry and well knowing said entry and the title issued thereupon were unlawful, corrupt, fraudulent, invalid, and voidable at the suit of the United States.

XIII.

That the said court erred in failing to hold upon a finding of facts appropriate thereto and properly to be made upon the evidence herein that the claims and entries of William J. White and Mamie P. White, designated and described in complainant's bill of complaint as amended in case No. 2210, were made and entered in fraud of the laws of the United States relating to such matters; and that the defendant Elizabeth White, who now holds the title to said entries, took the same with full knowledge and notice concerning the invalidity of said entries.

XIV.

That the said court erred in failing to hold that the entries of Edna P. Kester, Elizabeth White, Elizabeth Kettenbach, and Martha E. Hallett described in the bill of complaint in case No. 2210 were made by said last-named defendants in fraud of the laws of the United States relating to such matters, and that the titles to said entries is now vested, respectively, in said defendants, who hold the same in trust for the use and

benefit of the defendants, Kester, Kettenbach, Dwyer, and Robnett.

XV.

That the court erred in failing to hold that the entry of Joseph B. Clute, designated and described in complainant's bill of complaint as amended, in case No. 2210, was made and entered in fraud of the United States and in fraud of the laws of the United States relating to such matters, and are invalid and voidable at the suit of the United States, and that the defendant, the Idaho Trust Company, which now holds the title to the land contained in said claim and entry took the same with full knowledge, notice, and information concerning the invalidity of said entry, and well knowing that the said entry and claim and the title issued thereupon were unlawful, corrupt, fraudulent, invalid, and voidable at the suit of the United States, all in the manner stated and charged in said bill of complaint.

XVI.

That the said court erred in finding and in holding that the defendants in case No. 2211 did not have any knowledge or reason to believe that Harvey J. Steffey had any unlawful arrangement or understanding with the entrymen named and mentioned in said bill of complaint as amended.

XVII.

That the said court erred in failing to find and to hold that Harvey J. Steffey was the agent of the said defendants in procuring the entries involved in com-

plainant's bill of complaint in case No. 2211 to be made in fraud of the laws of the United States.

XVIII.

That the said court erred in failing to find and to hold that the defendants had reason to believe, and had knowledge of the fact that Harvey J. Steffey had unlawful arrangements, understandings, and agreements with all of the entrymen mentioned and named in said bill of complaint in case No. 2211, relative to the acquisition and disposition by said entrymen of the lands contained in their entries as charged in said bill of complaint.

XIX.

That the said court erred in finding and in holding in effect that the defendants, Kester and Kettenbach, purchased the lands designated and described in complainant's bill of complaint, in case No. 2211, under such circumstances as constituted the said defendants innocent purchasers of the said land in good faith, for value and without knowledge or notice of any fraud or other illegality in the title to the said lands.

XX.

That the said court erred in finding and in holding that the preponderance of the evidence is against the theory that the defendants, Kester, Kettenbach, and Dwyer, were jointly interested in the acquisition of title to the lands involved in this cause, as set out and described in complainant's bill of complaint in cases Nos. 2209 and 2210.

XXI.

That the said court erred in finding and in holding that at no time during the period covered by the transactions complained of in case No. 2209 was there any associational arrangement, either by way of partnership, or joint ownership, or otherwise, between the defendants Kester, Kettenbach, and Dwyer, or any one of them, and the defendant Robnett in the acquisition of the title to any of the lands involved in this case, as set out and described in complainant's bill of complaint as amended.

XXII.

That the said court erred in finding and in holding that the defendant Dwyer had no joint or partnership interest with the defendants Kettenbach and Kester, or either of them, in the lands involved in case No. 2209, which the latter purchased, as set out and described in complainant's bill of complaint as amended.

XXIII.

That the said court erred in holding in effect that, in the circumstances and upon the facts established by the evidence herein, the defendants were innocent purchasers of the lands involved in case No. 2210, in good faith, for value, and without notice or knowledge of fraud, illegality, or other defects in the titles to the said lands.

BRIEF OF ARGUMENT.**CONSIDERATION OF THE GENERAL EFFECT OF ALL THE EVIDENCE.**

What has been mentioned hereinbefore suffices to prove that the defendants, W. F. Kettenbach, Kester, Dwyer, and Robnett, in the spring of 1902 formed a conspiracy to obtain public timberlands in quantities greatly exceeding the area permissible by law, and that this conspiracy and agreement was intended to be, and was, made effective through the procurement, on a large scale, of entries under the timber and stone act, and that this procurement was accomplished by means of agreements for the acquisition of the lands, which agreements are of the character prohibited by the timberland statute, and that later Kester, Kettenbach, and Dwyer joined to themselves Steffey, for the same purpose and the same result was attained.

The evidence establishing this proposition is the whole of the evidence taken in the cases and that evidence as a whole. The general character and effect of this evidence are indicated in the statement hereof which is prefixed to this argument and which sets out the transactions proved with what doubtless appears undue prolixity, but in reality quite meagerly, and by mention of only the most material features of the history. It is unnecessary, and it would be impos-

sible, here to recapitulate all the circumstances tending to suggest that the entries were made in pursuance of unlawful agreements or on speculation and to further array the host of details which unite to render those suggestions a fixed conviction.

We must, however, bear in mind the circumstances under which Kettenbach, Kester, Dwyer, and Robnett began their operations in acquiring timber claims; their solicitations of their relatives, friends, and acquaintances to make entries in their behalf; the contests instituted of claims upon which filings had been made with the view of entering persons they controlled upon the claims when the contests would be decided or settled; the securing the employment of Dwyer as State selector in order that the State would not select the lands that they had arranged to file entrymen upon April 25, 1904; the fact that every entry was made at the solicitation of one of said defendants, or of their agents or coconspirators, Emory, O'Keefe, and Steffey, and with two or three exceptions they furnished the money for the entrymen to initiate the entries and to pay for the land and all incidental expenses; and that they acted in concert in their endeavor until the last entry that is involved in these cases had passed to Kester, Kettenbach, Robnett, or Dwyer, or through them to the person or corporation now holding the titles.

But the force of this evidence lies not so much in any or in many circumstances, though there are enough of those which are pregnant of proof, as in the cumu-

lative effect and the concurrent corroboration of all the facts.

The entire transaction, surveyed from its beginning to its end, appears to be a single enterprise, developed upon one general design, animated by a single motive, and executed upon certain uniform principles, with which all the incidents are entirely consistent. Whether viewed in its general aspect or examined in its details, the enterprise appears to have been conceived in fraud of the law and carried into effect by fraudulent means. No one can read this evidence without being profoundly impressed by the evidence, as a whole, that the defendants procured the entries to be made, and that such procurement was effected by means of agreements, or of understandings which were the moral equivalent of agreements, either expressed or implied, entered into with the entrymen, in advance of applications filed, by which the entrymen considered themselves bound to sell, and the defendants bound to buy, the lands to be entered. It is true that there were but few formal contracts made and that there were no contracts or agreements in writing, but it has been decided that the agreements denounced by the act of 1878 are not enforceable agreements, but are such understandings as, by reason of the statutory provision, depend for their execution upon the voluntary action of the parties and upon their conceptions of honor and moral duty.

Olson v. United States, 133 Fed. Rep., 849, 853.

U. S. v. Detroit Timber & Lumber Co., 200 U. S., 321.

Many of the entrymen appear to have supposed that there could be no contract that was not in writing, a circumstance mentioned in the case of the Detroit Company, *supra*, as affecting the value of such denials of a contract. It is not necessary, in order that the transaction shall be fraudulent, that the entrymen shall be intentionally and consciously guilty of wrongdoing, as also is held in the case of Detroit Company, *supra*.

The fact that many of the entrymen denied on cross-examination that they made agreements antecedently to making their applications does not go very far in any instance to show that agreements in fraud of the statute did not exist. As has been suggested, some of the entrymen had the notion, which is perhaps the prevalent popular notion, that there can be no contract which is not written. Probably most of them supposed, with more or less sincerity, that an explicit promise in express words was necessary to constitute a contract, but few, if any, had any conception of the contracts intended to be prohibited by the act of 1878 or understood that such understandings as have been herein characterized were unlawful, as has been adjudicated in the cases of Olson and the Detroit Co. All of the entrymen were disposed to put the fairest face possible upon their conduct, and the more so in cases where their conduct was felt to be compromising. Most of the entrymen were manifestly well disposed toward, if not actively sympathetic with, the defense, as will appear from almost any cross-examination taken at random from the transcript. The cross-examination of these Government witnesses was most remarkably protracted,

constituting probably one-half the testimony of the witnesses, and being certainly of a volume enormously disproportionate to the examination in chief. The reason for this is apparent upon the face of the situation. The Government, in order to elicit the facts upon which its cases are predicated, was obliged to show by the entrymen, whom these defendants had used, that the entry had been made and the circumstances of its making. All of these entrymen, with perhaps some few exceptions, whether they were or were not consciously guilty of wrongdoing, were naturally solicitous to purge themselves of any blame on account of what they had done. They were therefore predisposed to lend themselves to any cross-examination which sought to put their own conduct in a better light, and they accepted with avidity any suggestions with the color of innocence, and many instances can be found in the record showing the willingness of the Government witnesses to grasp at friendly suggestions from the defense.

So whether or not any one of the entrymen had entered into such an arrangement as is forbidden by the statute is not to be established entirely by what he says in response to a question framed in the words of the statute and admitting of a categorical answer, *but is to be inferred from the arrangement as it is proved*. And the testimony to this point of these entrymen is to be weighed like other testimony, with reference to the considerations of self-interest and self-protection pressing upon the witnesses; to their natural disposition to state their actions in the light most favorable to themselves; to their friendly attitude toward the

defense, which was so often developed by a sympathetic cross-examination; and to the inherent reasonableness of what they say and the harmony of the facts to which they testify, with other facts established in the case.

But, as has been said, notwithstanding the attitude of the entrymen and the other witnesses in these causes, their testimony as a whole, viewed in the light of undisputed facts and circumstances, establishes the fact that the entrymen made their entries in pursuance of an antecedent agreement or understanding with said defendants or their agents that the titles thus initiated should devolve to Kester, Kettenbach, Dwyer, or Robnett or to whomsoever they or their agents designated.

It is sufficient to say that the methods pursued, and the form of the negotiations, were precisely those which would naturally be adopted by persons meditating an unlawful proceeding and seeking to evade the inhibition of agreements for the sale of the lands. In such a case much would designedly be left unexpressed, and the arrangement would be purposely formulated in such manner as to appear without the sense of the statute, and would be clothed in such innocent guise as not to shock the tender conscience of a well-intending entryman. But the result intended, and the result accomplished, was the identical result which the statute was framed to prevent. Call it an arrangement, an understanding, an implied obligation, or what else may soothe the moral sense, the negotiation with the entryman had all the effect of a distinct and binding agreement that

he should transfer his title to Kester, Kettenbach, Robnett, or Dwyer, or to whomsoever they or their agents might designate. If such a transaction is not unlawful, then the statute renders itself ridiculous by lending itself to evasion of its prohibitions and by providing the means for its own defeat.

In *Nickell v. United States*, 161 Fed., 702, 706, decided by this court, it was said:

Section 2 of the act of June 3, 1878 * * * requires the entryman at the time of making his application to make oath that he has not made any agreement or contract in any way or manner, directly or indirectly, with any person or persons, by which the title shall inure to the benefit of any person except himself. That it was intended to meet the evasions which would be resorted to from time to time is quite manifest. Schemes, devices, and subterfuges which ingenuity could invent, and of which this case furnished a striking example, were in view equally with formal contracts. We are precluded from holding otherwise by the comprehensive language of the statute; and to sustain the contention of plaintiff in error in that regard would be equivalent to saying that its purpose can be entirely defeated by secret understandings and ingenious circumventions.

PRECEDENTS AS TO WEIGHT GIVEN EVIDENCE ANALOGOUS
TO THAT EMBODIED IN PRESENT CASES.

II.

On questions of fact precedents are generally of little weight, and other cases can seldom be controlling. Two reported cases, however, present states of fact so closely analogous to that embodied in the present evidence that the adjudications made in those cases have almost or quite the effect of an authority.

Olson v. United States, 133 Fed. Rep., 849, involved just such procurement as is shown here, and upon the facts, which were much less extensive and far less cogent, the Circuit Court of Appeals drew the inference of unlawful agreements.

United States v. Detroit Lumber Company, 124 Fed. Rep., 393; 131 Fed. Rep., 668; 200 U. S., 321, was even more strikingly similar upon the facts to the present case. In that case the bill was dismissed in the lower court, but the ruling of that court was reversed by the Circuit Court of Appeals, and the decision of the Appellate Court affirmed by the Supreme Court of the United States, and in order that we may more clearly see the application of the decisions of the Circuit Court of Appeals and the Supreme Court, we shall state the facts as found by the trial court and the reasons given for dismissing the bill. District Judge Rogers, who heard the case in the Circuit Court (124 Fed., 395), in the opinion said:

This bill was filed to vacate these patents upon one of two grounds: First. That there was

a conspiracy between Elmer B. Martin and Arch. V. Alexander, president and secretary, respectively, of the Martin-Alexander Lumber Company, and Jim P. Copeland, an employee of said company, and also an entryman, with their codefendants, who were entrymen, to induce and procure the entrymen fraudulently to make application to the land office of the United States at Camden, Ark., to enter each a separate portion of the said land, and that before said entries were made by said entrymen they had each entered into an agreement with the Martin-Alexander Lumber Company that each and every entry so made should be made for the use and benefit of the said Martin-Alexander Lumber Company, and that on the issuance of the receiver's receipts that each entryman should at once execute to the said Martin-Alexander Lumber Company a conveyance to it of all the timber and trees standing and growing upon the lands so entered, with certain other rights and privileges in the nature of easements upon said land. Second. That if such agreement and conspiracy did not exist, that each and every of said entrymen made his or her said entry on speculation, and not in good faith for the purpose of appropriating the same to his or her own use and benefit, which was well known to the said Martin-Alexander Lumber Company, and said Martin-Alexander Lumber Company aided and assisted each and every one of said entrymen in the accomplishment of said purpose, to wit, the entering of said lands on speculation. To this last allegation, which was an amendment, a demurrer was entered, and a stipulation filed to the effect that,

if the demurrer was overruled, the answer on file to the original complaint should be treated as applying to this allegation. The court overrules the demurrer, and will treat this allegation as denied by the original answer on file, in accordance with the stipulation. Each of the defendant entrymen answered, denying specifically the allegations of fact in the complainant's bill of complaint in so far as it alleged any fraudulent conduct upon their part, and each of the entrymen affirmed that the affidavits which they had made at the land office were true, and that the lands were purchased for their own use and benefit, and so appropriated. The Martin-Alexander Lumber Company and Detroit Timber & Lumber Company denied the allegations of fraud, and the latter also set up that it was an innocent purchaser. To these answers a replication was filed, and the case submitted upon pleadings and written proof. The record is most voluminous, and it is unnecessary to go into details. Two questions arise on this record: First. Is there such a combination or conspiracy shown to have existed between the Martin-Alexander Lumber Company and their codefendants (the entrymen) to obtain the lands in controversy for the use and benefit of the Martin-Alexander Lumber Company, as authorizes the annulment of the patents issued to the defendant entrymen? Second. Did the several entrymen make their said entries on speculation, and not in good faith, and not for the purpose of appropriating the lands to their own use and benefit? It will be more convenient to consider both questions together.

The proof in this case develops this state of facts: The Martin-Alexander Lumber Company had established a large sawmill and lumber plant in close proximity to the lands in controversy, and had also become the owners of large bodies of timberland adjacent thereto. There was no other sawmill or lumber plant, at the time these lands were entered, so near thereto as to make it practicable or profitable to cut the timber standing on the lands in controversy. The lands in controversy were not on the market except under the homestead law, and the stone and timber act, *supra*. Naturally the Martin-Alexander Lumber Company wanted all the timber it could get which was convenient to its mill plant. It had in its employ as timberman, or timber inspector, Jim P. Copeland, a resident of Pike City, where its mill plant was located, and he was an old surveyor, as well as real estate man, with large experience and much information in regard to lands in that vicinity; and was also well acquainted with the people residing in that vicinity, and especially with the lands, both public and private, in that county. Early in 1899 E. B. Martin, the president of the Martin-Alexander Lumber Company, who resided in Chicago, inquired of Copeland about timberlands in the county where the mill plant was located. Copeland informed him that there were many public lands in the county and adjacent to the mill plant valuable for their timber, and gave him the approximate amount. Martin then inquired how they could be procured. Copeland then told him they could be homesteaded, but the timber could not be cut until the patent was obtained or the homesteader had

resided on the land for the period of five years and in other respects conformed to the requirements of the homestead law. The proof also shows that these lands were not fit for cultivation, but were only valuable for their timber. Something was then said in reference to scrip which could be used in the entry of the lands. In the course of the conversation Copeland told Martin of the stone and timber act. Prior to this time he had written to the Member of Congress, Hon. T. C. McRae, and obtained a copy of it, and afterwards, having occasion to go to Camden, he had laid the law before the land officers, and he and they read it over together, and he obtained their construction of it. He also informed Mr. Martin that he knew of a number of good, honest people in the community who would like to take up land under the stone and timber act if they had the money. Copeland had at that time talked to some men whom he knew personally and favorably, who had expressed a desire to take up land under that act if they could get the money, and he so advised Martin. Martin then told him that they would loan that class of men the money if they would take up the land. Copeland then inquired what security he would demand, and he said simply their note, with 8 per cent interest. Copeland then hunted up the men that he had talked to, and others also, and others hunted him up to inquire about the entry of these lands, and he explained to them the law, and told them they could get the money to enter the lands from the Martin-Alexander Lumber Company, without security, and that the Martin-Alexander Lumber Company would trust to their honor to pay it,

He took them and showed them the lands, made them a probable estimate of the timber in the respective tracts, and told them that the timber on the land at 50 cents a thousand feet (which was the market price at that time) would pay more than the land would cost, and told them they could sell the land or the timber after the patents were issued. All the codefendants of the Martin-Alexander Lumber Company, nearly all of whom were employees, or had been, of the company, entered the land under the conditions just above stated. The money was furnished by the Martin-Alexander Lumber Company. Copeland usually went with the parties to examine the land, accompanied them to the land office, and furnished them the money, and they entered the land, made the necessary proofs in conformity with law, and their expenses to the land office and back were paid by the Martin-Alexander Lumber Company and charged to them upon the books of the company. Either just before the lands were entered and the receipts for the purchase money were obtained, or just afterwards, the money having been furnished to the entrymen by Martin-Alexander Lumber Company, they would execute their notes to the company for the amount, with interest, and in nearly all instances shortly afterwards they sold the timber standing on the land to the Martin-Alexander Lumber Company by a written contract, and the notes were canceled. By the terms of the contract the Martin-Alexander Lumber Company was to pay 50 cents a thousand stumpage for all the timber cut from the land, and the amount which had been loaned by it to enter the land was treated as

purchase money advanced on the timber, and, if the value of the timber exceeded the value of the money advanced, with interest, the seller was to get the difference. In some cases the entrymen declined outright to sell at all to the Martin-Alexander Lumber Company, and finally sold to other parties after the patents were issued. In such cases the person purchasing from the entryman was an agent for the Detroit Timber & Lumber Company, and took the deeds in his own name, but gave credit to the entryman for the moneys advanced by the Martin-Alexander Lumber Company to the entryman, and the lands were subsequently conveyed to the Detroit Timber & Lumber Company, which had succeeded the Martin-Alexander Lumber Company by purchase of all its rights and interests in connection with mill plant and lands. Before any of these lands were entered, the proof shows that Copeland took the law, and he and Martin, and perhaps Alexander, sat down and went over it together, and Copeland explained to them the construction placed upon the law by the land officers, informing them that the applicant would have to make affidavit to the requirements of the statute, and show that he did not make the purchase on speculation, but in good faith; with the intention of appropriating it to his own use and benefit; and that he did not, directly or indirectly, make any contract or agreement in any way or manner with any person or persons whatsoever by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any other person except himself. Both Martin and Alexander knew

that Copeland had examined and understood the law and Copeland had taken advice as to its construction, and imparted that information to Martin and Alexander. He also imparted the same information to the entrymen, and each and all of the entrymen not only made affidavit at the land office, as required by the statute, but nearly all of them, being called by the plaintiff, have testified and corroborated that affidavit by positive testimony, which is part of the record in this case. Alexander and Copeland have also testified substantially to the same facts, and have positively and emphatically denied that there was any agreement or understanding, expressed or implied, prior to the issuance of the final receipts by the land office, whereby the Martin-Alexander Lumber Company should have any interest of any kind whatsoever in regard to the lands or timber on them in controversy; and there is no proof by any witness to the contrary. There are many circumstances in connection with the transaction which are suspicious in their nature, and tend to create the belief that the Martin-Alexander Lumber Company understood, were satisfied, felt sure that the lands would ultimately come into their possession. I have no doubt in my own mind, from all the facts, that it did so believe, and, if it had not so believed, that it would not have advanced the money to the entrymen in order that they might enter the land. As intelligent business men, Martin and Alexander knew that at that time there was no one else who could cut and use the timber but themselves; they knew that the lands were not homesteads, nor susceptible of being made homesteads; they knew that when

the patents were issued the lands were not exempt from execution; they knew, if necessary, they could sue upon the notes and recover judgment and sell the land; they knew it was to the interest of the men who had entered them to sell the timber, and they knew that in making the entry the object of the parties was to sell the timber because the land was not fit for cultivation; they knew that the entrymen expected to get more from the timber than the land was worth, because Copeland had told the entrymen about what amount of timber was on the land, and what could be gotten for it at that time, and that more could be realized from the timber than it would take to enter the land; they knew their company could afford to pay more for the timber because their mill was already located in closer proximity to it than any other mill; they knew also that the persons to whom they had loaned the money were honest men, and would desire to pay their debts; they knew, in all reason, that they had not other resources out of which to pay back the borrowed money; they knew, therefore, that in all probability they would ultimately get the timber, and that they could purchase it without any fair competition with others.

Assuming all these things to be true, and that their motive for lending the money and assisting in making the entries was with the hope of ultimately getting the timber, which one of these acts is either violative of the letter or spirit of the timber and stone act?

The court then quotes copiously from the Budd case and the Maxwell Land-Grant case and states that the

facts in the case then in discussion are no stronger in favor of the Government than they were in the Budd case, and in his opinion they were not so strong.

For the reasons thus given the bill was dismissed for the want of equity.

It will be noted that in the Detroit case just quoted that the *entrymen* were made *codefendants*, and that each entryman answered, *denying* specifically the allegations in the bill in so far as it alleged any fraudulent conduct on their part, and each entryman *affirmed* that the *affidavits* which they had made at the land office were true. The *companies* also *answered, denying* the *allegations of fraud*. Each entryman not only made an affidavit to the land office, as required by the law, but nearly all of them were called by the plaintiff, testified, and corroborated that affidavit by positive testimony; that Alexander and Copeland testified substantially to the same facts as did the entrymen and positively and emphatically denied that there was any agreement or understanding, expressed or implied, prior to the issuance of the final receipts by the land office; that Copeland knew the proper construction to be placed upon the timber and stone act and explained the same to the entrymen; that the Martin-Alexander Company furnished the money for the entrymen to initiate the entries and to make proof, but that a note was taken for the full amount with interest at 8 per cent at the time of final proof; and a number of the entrymen were solicited by Copeland, while others sought him. Copeland explained to the entrymen the amount of timber on the land and what could be gotten for it at that

time, and Copeland also told the entrymen that they could sell the land after patents were issued.

The Circuit Court of Appeals in deciding the same case, 131 Fed. Rep., 668 & 679, makes practically the same statement of facts, adding however that most of the entrymen were poor and unable to pay for the land without borrowing the money; that Copeland assisted them to select the land and to make their entries. They made two journeys to the local land office, one to make their applications and one to pay for the land and obtain their final receipts. The Martin Company paid their traveling expenses upon these trips and the fees for the publication of the notices required by the statute; that 25 of the 44 patentees were employees of the Martin Company and 10 were wives of employees; that when the time came to pay for the lands the company loaned to each one of the patentees the amount required for that purpose, and he or his companion or agent paid for the land and obtained the final receipt; that within a few days after the final receipt was obtained he made a promissory note for the amount he had paid for the land and interest at 8 per cent per annum; that *he then made a written agreement* with the Martin Company that in consideration of \$1 and of the covenants recited therein he "has bargained, sold, and conveyed" unto the company all the timber and trees upon the land, etc.

Circuit Judge Sanborn in announcing the decision of the court, after stating that the Detroit Timber and Lumber Co. was an innocent purchaser as to the lands

conveyed to it (131 Fed. Rep., 679), said as to the entries remaining in the original applicants:

There remain 17 tracts of land the title to which still stands in the original applicants and patentees * * *. The evidence in this *record has convinced, not that these applicants made any agreements by which the title which they might acquire should inure to the benefit of any person except themselves*, but that each one of them applied to enter the lands he or she *obtained on speculation for the use and benefit of the Martin-Alexander Lumber Company and not in good faith* to appropriate it to his or her own exclusive benefit. The salient facts which were proved in this case and which have forced our minds to this conclusion appear in the statement which precedes this opinion, and no good purpose would be subserved by restating them here.

The decree below is accordingly reversed.

Although all the entrymen, being called as witnesses, denied that any agreements had been made for the transfer of the lands to the lumber company, the Supreme Court, affirming the judgment of the Circuit Court of Appeals, found that the transaction of itself proved the existence of such agreements. (*United States v. Detroit Lumber Company*, 200 U. S., 321.) The opinion on these points reads:

The entire management of these entries was in the hands of an agent of the Martin-Alexander Company. It furnished the moneys, both for the purchase prices and all expenses, and it is not easy to believe that it did all this on a mere expectation that after the entries had been made it could purchase the timber. It is a

much more reasonable conclusion that it had an understanding with the parties making the entries respecting purchases and prices. It is quite likely that the entrymen were not conscious of wronging the Government, and thought that if it received the full price demanded, that was enough. The testimony of one witness suggests at least that they may have been advised that there was no contract unless it was in writing, and that hence they could conscientiously take the oath required in connection with an entry. So, without casting any imputation of intentional perjury on those parties, we agree with the Court of Appeals that the testimony points strongly to the fact that the entries were in pursuance of an understanding or agreement with the Martin-Alexander Company, that, as it was advancing all the money, the entrymen should convey to it the standing timber at a fixed price.

See also *U. S. v. Smith et al.*, 181 Fed. Rep., 545.

These cases, although perhaps not of controlling authority upon the questions of fact involved herein, show in what manner similar questions of fact have been determined, and constitute monuments for judicial guidance in dealing with present conditions. And it is submitted that, upon this evidence, and with proper respect for the precedents cited, it should be found that the entries herein involved were procured by, and made in pursuance of, such agreements as are prohibited by the act of 1878, or such understandings as amount to such agreements and are equally within the prohibition of the statute.

One of the facts appealing to the Supreme Court in the Detroit Timber & Lumber Company Case was that the Martin-Alexander Company furnished the entrymen the money with which to make proof and pay for the land. As this money was furnished at the time of final proof and was a forceful element in inclining the Supreme Court to the opinion that the entries were made pursuant to antecedent agreements with the Martin-Alexander Company, and for that reason ordered that the patents issued thereon should be canceled, it would seem that there could be no question of the admissibility of such evidence and that it should be weighed with all the other evidence in the cases.

DECISIONS UPON CASES ARISING UNDER THE TIMBER AND
STONE LAW.

United States v. Budd, 144 U. S., 154.

United States v. Clark, 138 Fed., 294.

United States v. Clark, 200 U. S., 601.

United States v. Barber Lumber Co., 194 Fed., 24.

United States v. Detroit Lumber Co., 200 U. S.

The extent to which a person or corporation desiring to acquire large quantities of the Government timberlands may go, without violating the provisions of the timber land law is announced in the Budd case; and in almost every case arising since the Budd case was decided, in which a violation of the timber land act has been charged, that case has been cited and quoted from. Mr. Justice Brewer, in announcing the decision, said:

The particular charge is, that Budd, before his application, had unlawfully and fraudulently made an agreement with his codefendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such codefendant. * * * The act does not in any respect limit the domain which the purchaser has over the land after it is purchased from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If, when the title passed from the Government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfactory. Montgomery might rightfully go or send into that vicinity and make known generally, or to

individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person knowing of that fact might rightfully go to the Land Office and make application to purchase a tract from the Government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to the purchase from the Government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law. (144 U. S., 162, 163.)

This court, in *United States v. Barber Lumber Co.*, 194 Fed., 24, 30, 31, 33, said:

The decision in the present case is ruled by the legal principles announced in the Budd case and in the Clark case (*U. S. v. Budd*, 144 U. S., 154; *U. S. v. Clark*, 138 Fed., 294; and *U. S. v. Clark*, 200 U. S., 601). Those decisions are authority for the proposition that a person or corporation desiring to acquire title to a large body of timber lands of the United States under the Timber and Stone act may express that desire to another, and may enter into an agreement with him to buy the lands upon his obtaining title thereto, may loan him the money with which to acquire title, and may inspect and select the lands, and that such person or corporation is not bound to inquire into the methods by which the other party to the contract acquired title and is not chargeable with knowledge of any fraud under the land laws that he may resort to, and that in taking titles based upon the issuance of final receipts to the entry-

men without actual knowledge of such fraud or of facts sufficient to put him upon inquiry, such person or corporation is an innocent purchaser of the land.

After referring to the contract between Steunenberg, and Barber and Moon, and the fact that some of the land was to be acquired by scrip, the court continuing said—assuming that the title was to be obtained by entries under the Timber and Stone act—

he (Steunenberg) could rightfully go into the Idaho timber country and make known generally his willingness to buy timber lands at a price in excess of that which it would cost to obtain it from the Government, and persons knowing of that fact might rightfully go to the Land Office and make application, and purchase the timber tract for the purpose of selling it to him (pp. 31, 32, *ib.*).

The court, referring to the Crooked River entries, suggested that there is evidence tending to prove that these entries which were subsequently acquired by the defendants may have been made in violation of the provisions of the timber and stone act;

but the decided weight of the testimony of such illegal act, if such there were, was induced by the locators, Downs and Wells, for their own individual advantage, and not at the instance of Barber or Moon or the appellee or to their knowledge (p. 33, *ib.*).

And again in the statements of the case, the court said:

There is no evidence that during the time of these transactions, either Barber, Moon, or the

appellee had any dealings or correspondence with Kinkaid, Pritchard, Wells, Downs, Sweet, or Martin (p. 29, ib.).

In *United States v. Clark*, 200 U. S., 601, 607, 608, the court said:

We may assume for the purposes of decision, as did the Circuit Court of Appeals, that the original frauds are made out, although there is a great amount of testimony to good faith. * * * There is nothing sufficient to show that Clark had actual knowledge of the arrangement by which Cobban got the land. The allegation that Cobban was Clark's agent in the purchase wholly breaks down. Clark was at a distance. He dealt as a purchaser with Cobban, and paid him the market price, and a substantial profit even on the Government's calculation.

The Supreme Court affirmed the decision of this court and held that Clark was an innocent purchaser.

Of the reasons stated by this court in the Barber Lumber Company case, and by the Supreme Court in the Clark case, for holding that said appellees were innocent purchasers, were that Barber and Moon and Clark lived at a distance from the scenes of the unlawful operations; that no agency existed between Clark and Cobban and that Clark dealt as a purchaser with Cobban; and that neither Barber nor Moon, on behalf of themselves or the Barber Lumber Company, had any correspondence or dealings with Downs or Wells, who dealt directly with the entrymen in procuring the entries to be unlawfully made and in locating them on the lands,—a very different situation than in

the present case, wherein Kester and Kettenbach were on the ground all the time. They conferred with their agents or conspirators, Robnett, Dwyer, Emory and Colby, O'Keefe and Steffey, almost daily in regard to entries to be made or that were making, in the bank in which they were officers, and came in contact with many of the entrymen under the conditions hereinbefore referred to, and of which further mention will be made.

The language of the Budd case is very broad, but it can not be construed to mean that a fraud upon the timber land laws is impossible of proof so long as the parties to the fraud decline to admit it, or unless a number of persons have overheard the terms of the agreements discussed between said parties, or unless some one produces a copy of the agreement made by them. To say that a person might go or send into a given vicinity, and make known generally or to individuals a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government, and any person knowing of that fact might rightfully go to the land office and make application to purchase a tract from the Government, is in effect a very different situation from that in which a person desiring to acquire large tracts of public timberland seeks out a number of impecunious persons, and he or his agents makes known to them his wishes in that regard, and states that he is willing to purchase the timber claims at a price in excess of the amount at which they can purchase the claims from the Government, and that if necessary he will either furnish or lend them the money for that purpose. In such cir-

cumstances, if the person or persons sought out immediately thereafter, went to the land office and filed upon timber claims and were furnished or loaned the money or a part thereof for that purpose, or to perfect the entries, by the person who made the suggestion, and that soon after making proof they should convey the title to the claims so acquired to him, it would seem that notwithstanding all of said persons should deny that they had a prior agreement or understanding as to what they should do with the claims after proof, the court would be justified in holding that the entries were made pursuant to a prior agreement that they would do just what was done.

SPECULATION.

TO ENTER A TIMBER CLAIM ON SPECULATION IS A FRAUD
UPON THE TIMBER AND STONE LAW.

The Supreme Court in the Budd case, in referring to the timber and stone act, said that—

All that it denounces is a prior agreement, the acting for another in the purchase.

The question as to whether Budd had entered the claim then in suit on speculation was not raised; and the court had just before making the remark above quoted said:

The particular charge is, that Budd before his application, had unlawfully and fraudulently made an agreement with his codefendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such codefendant,

The Supreme Court has repeatedly held, and it is unnecessary to cite the cases here, that the courts are not bound by expressions in opinions where the questions to which the statements or expressions relate were not raised or argued in the case in which they were made, if a determination of the questions was not necessary in reaching a decision in the case.

In order that it may be made plain that Congress in passing the timber and stone act not merely intended that the public timber lands should not be taken up pursuant to a prior agreement but also that they should not be entered for the purpose of speculation, we shall point to the events contemporaneous with the passage of that Act, and the matters that were pressed upon the attention of Congress in connection therewith.

While the statements made and the opinions advanced by the promoters of an act of Congress are inadmissible as bearing upon its construction, yet reference to the proceedings of each House of Congress may properly be made to inform the courts of the exigencies that required the passage of the act and the evils sought to be guarded against. (*American Ncl & Twine Co. v. Worthington*, 141 U. S., 473.)

In the case of the *Holy Trinity Church v. The United States*, 143 U. S., 463, Mr. Justice Brewer, in announcing the decision of the court, said:

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at the contemporaneous events, the situation as it exists, and as it was pressed upon the attention of the legislative body.

In *Dunlap v. United States*, 173 U. S., 75, the court said:

Without questioning the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body (*U. S. v. Trans-Missouri Freight Association*, 166 U. S., 290, 318), it is nevertheless interesting to know that efforts were made in the Senate to amend the bill by the additions of sections which, while making alcohol used in the arts free from the tax, sought to secure the Government from fraud by provisions for the methylating of such spirits so as to render them unfit for use as a beverage; that these proposed amendments were rejected (26 Cong. Rec., 6925, 6936); and that subsequently section 61 was adopted as an amendment, it being urged in its support that, if the Secretary of the Treasury and the Commissioner of Internal Revenue think they can not adopt any regulations which will prevent fraud, then nothing will be done under it; but if they conclude they can adopt such regulations as will prevent fraud in the use of alcohol in the manufactures or the arts, then there will be relief under it. (26 Cong. Rec., p. 6985.)

During the Forty-third, Forty-fourth, and Forty-fifth Congresses a number of bills were introduced in either Houses of Congress, having for their purpose the disposition of the public timber lands in Oregon, California, Washington, and the Territories, and some of them included the timber lands in other States. These bills were very similar, and in so far as they may have a bearing upon the question now under consideration they were the same, except in the instances which we shall mention.

The bills are as follows:

H. R. bill No. 410, introduced by Mr. Page at the first session of the Forty-third Congress, December 8, 1873.

H. R. bill No. 4149, reported by Mr. Bradley December 23, 1874, as a substitute for H. R. bill No. 410. (Vol. 3, p. 229, Cong. Rec.) This bill passed the House February 22, 1875, and the following day in the Senate was referred to the Senate Committee on Public Lands, but failed of passage. (Vol. 3, p. 1617, Cong. Rec.)

H. R. bill No. 1191 was introduced by Mr. Sayler (of Oregon) January 17, 1876, at the first session of the Forty-fourth Congress, and referred to the Committee on Public Lands of the House (vol. 4, p. 443, Cong. Rec.), and was reported back with amendments and recommitted March 15, 1876. (Vol. 4, p. 1726, Cong. Rec.)

H. R. bill No. 660 was introduced by Mr. Maginnis (of Montana) at the first session of the Forty-fourth Congress, January 6, 1876, and referred to the Committee on Public Lands. (Vol. 4, p. 303, Cong. Rec.)

H. R. bill No. 141 was introduced by Mr. Page (of California) at first session of the Forty-fourth Congress, December 14, 1875, and referred back to the Committee on Public Lands. (Vol. 4, p. 212, Cong. Rec.)

S. bill No. 6 was introduced by Mr. Kelly (of Oregon) at the first session of the Forty-fourth Congress, December 8, 1875; read twice and referred to the Committee on Public Lands. (Vol. 4, pp. 186, 187.) The bill was reported back to the Senate without amendments February 8, 1876. (Vol. 4, p. 934, Cong.

Rec.) This bill was debated, amended and passed the Senate: (Vol. 4, pp. 934, 1100 to 1107, 1142 to 1146, 1146 to 1191, Cong. Rec.)

All of said bills require that the applicant should make affidavit at the land office and swear, among other things:

That he does not apply to purchase the same *on speculation*, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself.

H. R. bill No. 1191 and S. bill No. 6 require that the entryman, as a part of his application, should swear that he was applying to purchase the land in good faith to appropriate it to his own exclusive use and benefit, *and not for sale*, in addition to the matter above quoted as required in the other bills, as a part of the application.

Mr. Kelly, of the Committee on Public Lands of the Senate, in presenting Senate bill No. 6, February 16, 1876, for consideration, said:

I will simply state that this bill is a copy of one that passed the House of Representatives at the last session of Congress. It was then well considered by the House committee and a printed report made upon it. It came to the Senate too late for consideration at the last session. At an early day in this session it was introduced by me, referred to the Committee on Public Lands of the Senate, and received a full consideration before

that committee at two or three meetings, and I was instructed by that committee to report it back without amendments and recommend its passage. * * *

He then stated that it was not the purpose of the bill to abrogate either the preemption law or the homestead law, and continuing, said:

It has been too frequently the case that persons desiring to cut timber on the public lands will take either a preemption or a homestead claim, go upon it, cut down and sell the timber, and never pay for or enter the land. The purpose of this bill is to do away with these trespasses upon the public domain, so that persons may acquire title without residence, and have an interest in the timber lands, and protect them from destruction and protect them from trespass. * * * The Government should receive something for its lands; there is no reason why it should not; and the committee, after careful consideration, thought that many persons, rather than go upon a tract of land as a homestead and reside upon it five years, would prefer to pay \$2.50 per acre; and in that way it will make an honest business, and people will get the timber honestly, instead of cutting it from the public land as trespass.

There is another reason, as I said, many persons owning claims in the vicinity of the timberlands trespass upon them, cut down the timber, and take it for the purpose of fencing and building, removing it from the public lands. The object of this bill is that they may acquire the right to this timber by purchasing the land.

Then they will have an interest in protecting the timber, instead of destroying it. * * *

I may say further that in the mining countries, where it is necessary to have timber for mining purposes to smelt the ores, the timber is removed from the public lands now by any person who may choose to take it. It may be said that they should be punished for their trespass. They may be, but they never are. In fact it becomes a necessity to have timber to smelt the ores and to conduct mining operations wherever they are carried on; and to say that timber shall not be taken is to say that we simply mean to shut down on mining operations forever. (Vol. 4, Cong. Rec., p. 1100.)

Senator McMillan then proposed an amendment to section 2 to the effect that deponent shall swear that he has not executed any mortgage or other instrument upon said land by which the title thereto may be vested in any other person. This amendment was defeated. In discussing it, however, Mr. Sargent said:

I think the friends of the bill have no objection to the amendment proposed by the Senator from Minnesota; I certainly have none myself *and if the machinery of the bill can in any way be guarded so that speculators can not take advantage of this law if we pass it, I shall be very glad to have that done.* Nearly the whole bill is taken up with provisions *hedging in opportunities for speculators to avail themselves of its provisions to acquire large tracts of land under it.* * * * This is hedged around by oaths and papers and documents in every form which careful ingenuity can provide. If any Senator, as the Senator from Minnesota has proposed, can devise lan-

guage which will still more guard that portion of the bill we would like it to be guarded, because, while I would desire that there be an opportunity for our people honestly to carry on this business, *I do not wish this land to be absorbed by speculators* * * *.

Mr. HOWE. Why not provide that these lands shall be offered at public sale?

Mr. SARGENT. Because then you give an opportunity to speculators. (Vol. 4, p. 1101, Cong. Rec.)

* * * * *

Mr. SARGENT. Will the Senator from Illinois allow me a moment? I should like to say to the chairman of the committee that the committee did endeavor to guard it, and my impression is that the bill does guard it; or, if it does not, I certainly concur with the suggestion that it should be made to do. The affidavit which the enterer is required to make says, among other things, that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and not for sale. * * *

That is to say, there are two things: In the first place, *no speculation whatever* moves him in this matter, and, in the next place, the title is entirely for his own use. But if the Senator is not satisfied with that language, I will say to him, for the sake of the people of my own State, to propose an amendment which will cover this. I think this does. (Vol. 4, p. 1103, Cong. Rec.)

Senator Sherman, who desired that there be no restriction whatever upon the sale of the timber lands, being of the opinion that they should be sold for the

purposes of revenue, urged that the bill as drawn would not defend it against speculators. He said:

A speculator can ride through this bill with a coach and four without any difficulty. A speculator can organize a system under the terms of this bill by which he could buy for a corporation every quarter section of land in that timber country that he desired to purchase. How? He could send its agents all through this timberland to select favorite quarter sections; each agent would go and make the affidavit prescribed by this bill, and even before he started on his journey he would make a contract with the corporation or with a lumber company to sell the lumber growing upon that land. He could make the oath without even swearing falsely. Now no man can gain possession of a quarter section of this timber country except by swearing falsely. * * * If this land is open for settlement under the provisions of this bill, a man could very easily say that he would not sell the title of the land, the ownership of the land, the fee of the land, or any other term we may use, and yet he may make a contract to cut and sell the stumpage. * * * That would be sufficient for the adventurous proprietor of a sawmill to cut every stick of timber upon it and thus evade the provisions of the law. (Vol. 4, p. 1105, Cong. Rec.)

Though the suggestion of Mr. Sherman that all restrictions be taken out of the bill and that the timberland be sold for the purposes of revenue was not followed, in order to safeguard the measure against the danger of the land being acquired by speculators, as pointed out by Mr. Sherman, Mr. Sargent offered the

following amendment: To insert after the words "United States," in line 19, in section 2, the following: "or any right in said land or the timber thereon," so that it will read:

and that he has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States, or any right in said land or the timber thereon, should inure, in whole or in part, to the benefit of any person except himself. (Vol. 4, p. 1145, Cong. Rec.)

The amendment was agreed to (vol. 4, p. 1187), and the bill passed the Senate February 21, 1876 (p. 1191).

In the particulars mentioned, Senate bill No. 6 just referred to is the same bill that in the next session of Congress was known as Senate bill No. 926, with the exception that in the latter the entryman is not required to swear as part of his application that he does not intend to sell the land. Senate bill No. 926 passed both Houses at the second session of the Forty-fifth Congress and is the present timber and stone act. It was introduced by Mr. Sargent, of California, and referred to the Committee on Public Lands. (Vol. 7, p. 1753, Cong. Rec.) It was reported back by Mr. Booth from the Committee on Public Lands with amendments (vol. 7, p. 2187, Cong. Rec.) and passed the Senate April 25, 1878 (vol. 7, p. 2842). It was reported to the House Committee on Public Lands (p. 2929), corrections were made, and passed the House May 11, 1878 (p. 3388). The Senate concurred in the House amendments and the bill was examined, signed,

and approved by the President June 3, 1878. (Vol. 7, pp. 3450, 3533, 3560, 4017.)

Prior to the passage of the timber and stone act persons could not enter the public lands except under the homestead law and the preemption law, and if they entered lands under either of these laws, it was necessary that they should reside upon them, and they had to swear that they had entered the same for a home and for settlement and cultivation. It would be impossible for persons to cultivate the lands in portions of the timber regions in California and Oregon, and therefore there was no way for them to acquire the timberlands lawfully. The only way in which persons could secure the timber in those States for domestic purposes and for use in mines was to steal it. If they entered the land under the preemption law or the homestead law, they would of necessity have to perjure themselves in the affidavit they were required to make upon entering; and if they went upon the land and cut the timber without entering the same under either of these laws, they would be subject to a conviction for trespass and to a judgment in a civil suit for the value of the timber. So, in order that the settlers in the western country who had need for timber could lawfully obtain the same, Congress passed the timber and stone act and at the same time endeavored, as far as possible, to protect the public timber lands from being entered upon speculation or for the benefit of speculators.

In *United States v. Detroit Lumber Company*, 200 U. S., 321, the Circuit Court of Appeals held that the claims remaining in the original entrymen were *entered on speculation* for the use and benefit of the Martin-

Alexander Lumber Company and not in good faith to appropriate it to his or her own exclusive use and benefit. The Supreme Court, in affirming the judgment of the Circuit Court of Appeals in said case, found that the entries were made pursuant to agreements, but this can in no way be construed to mean that the statute may not be violated as readily by entering land thereunder upon speculation as well as pursuant to a prior agreement.

Hafemann v. Gross, 199 U. S., 342, 349, was a suit to enforce a contract for a portion of the proceeds of a sale of land entered under the preemption law, the agreement having been entered into prior to entry; that law required the preemptor to make affidavit as part of his application similar to that required of a person entering public land under the timber and stone act. In the dissenting opinion of Mr. Justice White, in which Mr. Justice McKenna and Mr. Justice Holmes concurred, appears the following:

The preemptor must swear "that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use." Could this statement have been truthfully made in view of the agreement by which the preemptor bound himself after his purchase, if he sold the land, to pay to the other parties to the contract one-fourth part of the purchase price?

This statement that it would be a fraud upon the preemption law to enter lands under the same on speculation is not in conflict with the views expressed in the majority opinion. The majority reached their conclu-

sion by finding that under the agreement entered into by the preemptor he was in no way bound to sell his claim; and though he made entry in 1890 and a patent was issued for the claim in December, 1891, he did not sell the claim until July, 1902, more than ten years after he had obtained patent therefor.

VALID ENTRIES.

We shall not contend that there is sufficient evidence to justify the cancellation of the patents to the entries of John W. Killinger, William E. Helkenberg, Fred E. Justice, George W. Harrington, and Geary Vanartsdalen.

INVALID ENTRIES.

The evidence hereinbefore set out shows that all of the claims, with the exception of the five above mentioned, were entered in fraud of the statute. That evidence shows that each entryman had an agreement, either expressed or implied, prior to initiating his entry, with defendants or their agents, as to the disposition to be made of his claim after final proof; and the testimony of each entryman, brought out in most cases on cross-examination, proves beyond question that all of said entrymen also made their entries on speculation.

ENTRIES HELD BY KESTER AND KETTENBACH.

The titles to all of the entries involved in cases No. 2209 and No. 2211 are vested either in Kester and Kettenbach, or Kester or Kettenbach. They are the entries of Maris (p. 44, *ib.*), Little (p. 63, *ib.*), Harrington (p. 67, *ib.*), Pierce, (p. 70, *ib.*), Bashor (p. 72, *ib.*),

F. M. Long (p. 74, *ib.*), J. H. Long (p. 77, *ib.*), B. F. Long (p. 79, *ib.*), Ferris (p. 85, *ib.*), Robinson (p. 89, *ib.*), of the Robnett group; and of Charles W. Taylor (p. 135, *ib.*), Jackson O'Keefe (p. 133, *ib.*), Edgar J. Taylor (p. 141, *ib.*), Prentice (p. 139, *ib.*), and Dammarell (p. 143, *ib.*), of the O'Keefe group in case No. 2209; and of Charles S. Myers (p. 210, *ib.*), Jannie Myers (p. 212, *ib.*), Mary A. Loney (p. 214, *ib.*), Effie A. Jolly (p. 216, *ib.*), Charles E. Loney (p. 220, *ib.*), James T. Jolly (p. 222, *ib.*), Clinton E. Perkins (p. 225, *ib.*), Frank J. Bonney (p. 227, *ib.*), of the Steffey group in case No. 2211. The number set out opposite each name refers to the page in this brief at which the evidence relative to each particular entry is mentioned.

The District Court held that the Steffey entries were made pursuant to prior agreements between Steffey and the entrymen, but that Kester and Kettenbach acquired and hold the titles thereto as innocent purchasers; that the Maris entry was made in accordance with an agreement between the entrywoman and Robnett in violation of law, but that Kester and Kettenbach were not aware of the illegal agreement and that they purchased the claims in good faith; and as to the other entries, that the evidence is not sufficient to sustain the charge that they were made in violation of law.

INNOCENT PURCHASER.

The District Court held that the defendants Kester and Kettenbach were purchasers in good faith and for value of the entries forming the Steffey group just mentioned. We will now discuss the reasons assigned by

the court for reaching that conclusion. In the opinion the court states in effect that the only evidence that would tend to show a conspiracy between Kester, Kettenbach, Dwyer, and Steffey, or that Steffey, in procuring the entries to be unlawfully made, was acting as the agent of Kester, Kettenbach, and Dwyer, is the testimony of Steffey; that Steffey's testimony is denied by Kester, Kettenbach, and Dwyer and that Steffey's credibility is impeached by the fact that he is an accomplice and that he suborned perjury and was guilty of the moral obliquity of perjury in procuring entrymen to swear falsely at final proof.

In our introductory statement of the evidence (p. 5, *ib.*) we have discussed the weight that should be given the testimony of the more important witnesses in the cases, and it seems unnecessary to repeat it. A reading of the testimony in connection with the various entries composing the Steffey group (pp. 203 to 235 *ib.*) will show plainly that Steffey was acting in concert with Kester, Kettenbach, and Dwyer as their coconspirator or as their agent.

There is no question that Kester, Kettenbach, and Dwyer were acting as coconspirators in attempting to induce Hutchins, Pfeffley, and Roos to enter claims for their use and benefit in 1902 and 1903; that the same relations existed between them in procuring the entries to be made for their use and benefit of the claims of Lambdin and Shaeffer in 1902; and in inducing Cornell to make an entry for them in June, 1903; and also in procuring the entry of Guy Wilson and Frances Justice, (which the court held for cancellation), and the other persons forming the O'Keefe and Kester, Kettenbach

and Dwyer groups in the spring of 1904; and in instituting the contest herein mentioned for their use and benefit. The court held that Dwyer, in procuring the entry to be made of the Wilson claim, was acting as the agent of Kester and Kettenbach, and that they were therefore charged with notice (p. 286). It having been established that said defendants in 1902 formed the conspiracy or agency mentioned, all the evidence shows that the same relations continued to exist between them until June, 1904, the date of the agency of Dwyer spoken of by the court, and from then down to the making of the last entry in these suits. Moreover there is no other evidence than that of the defendants themselves that they were not acting in concert until the last entry in the suits was acquired. The first entry that Steffey procured to be made was that of Charles Myers, and Steffey testified relative to the agreement he had with Dwyer prior to the making of the entry, as well as to the agreement he had with the entryman. The court finds that Steffey contradicted himself as to the date that he talked with Dwyer relative to the claims forming his group, and reasons from that contradiction that, according to Steffey's testimony, his arrangement with Dwyer relative to said claims was not until after all of the entrymen but two had initiated their entries and were about to make their final proof. Though Steffey was unable to remember the exact dates, he testified very plainly that the agreement he had with Dwyer was before any of the entrymen had as much as gone to view the claims and quite a time before they initiated their entries, and this is corroborated by all the facts and circumstances herein set out relative to said entries,

and by the further fact that the first entry which Steffey procured to be made—that of Charles Myers in the latter part of 1905—was upon one of the homesteads that Dwyer had contested, and Dwyer furnished the relinquishment at the time the entry was made. The court bases its finding upon the following evidence taken from the cross-examination of Steffey:

Q. Now, what was the conversation you had with Dwyer regarding these Myers and Bonney and Jolley claims you speak of, the first conversation you had regarding it?

A. I told him about these lands that I had cruised out, and he told me to get somebody and locate on them and tell them we would give them \$200 after they had proved up on them.

Q. And that is all that was said?

A. Well, yes; in particular about that.

Q. Now, when was that?

A. I couldn't say when it was; the exact date.

Q. Then what did you do?

A. I went up and located them.

Q. Dwyer told you that he would give them \$200 over and above expenses?

A. Yes, sir.

Q. Had Dwyer gone and looked at the claims?

A. Some of them he did.

Q. What claims did he go to look at?

A. He went to look at Mrs. Loney's and Mrs. Jolley's claims.

Q. Did he know that Mrs. Loney and Mrs. Jolley were going to take those claims?

A. I think they had already taken them when he looked at them.

Q. Hadn't they already filed on them?

A. Yes, sir.

Q. Hadn't they made their final proof too?

A. I don't think they had.

Q. To refresh your recollection, wasn't it after they made final proof and just before they made the deeds that Dwyer went up and looked at them?

A. Possibly, but I don't recollect it. (Pp. 356, 357.)

The court says that it is clear from this testimony, if taken to be true, that the conversation relied upon as constituting the agreement between Dwyer and Stéffey did not take place until after Dwyer had looked at the claims of Mrs. Loney and Mrs. Jolley, and that Dwyer had not looked at these claims until after they were filed upon, and that only one claim was entered after the filing of these claims. The court seems to have failed to put the proper construction on the language quoted. Steffey testified very frankly both on direct and cross examination as to all matters concerning which he was interrogated, and it is apparent that he was frank in giving the testimony just quoted. Steffey is illiterate and somewhat dogged, and a careful reading of the quotation shows that the construction placed upon it is not justified. From the testimony that precedes the first question quoted, it will be seen that counsel for the defendants had been inquiring about other entrymen that Steffey had located with which it is not claimed that any of the defendants had anything to do. Counsel then asked: "Now, what was the conversation you had with Dwyer regarding these Myers, Bonney, and Jolley claims you speak of.

the first conversation you had regarding it?"—having reference to the entire Steffey group (p. 1824). Steffey then states what he told Dwyer about the persons he could locate on the claims, meaning the whole group, and says that after his conversation with Dwyer he took the persons named to the claims and located them. The next question asked by counsel for the defense has no reference in point of time to the four questions that precede it. It does not begin "Then did Dwyer tell you," etc., but reads:

Q. Dwyer told you that he would give them \$200 over and above expenses?

A. Yes, sir.

The witness understood that he was being inquired of as to the arrangement he had with Dwyer at the first conversation and what Dwyer was to allow for the claims, and the language of the question would not indicate that the defense was attempting to fix the date of the conversation. Then the next questions:

Q. Had Dwyer gone to look at the claims?

A. Some of them he did.

Q. What claims did he go to look at?

A. He went to look at Mrs. Loney's and Mrs. Jolley's claims.

Q. Did he know that Mrs. Jolly and Mrs. Loney were going to take those claims?

A. I think they had already taken them when he looked at them.

Q. Hadn't they already filed on them?

A. Yes, sir.

It is apparent that the witness understood that he was asked "Did Dwyer go to look at the claims?" for he answered "Some of them he did," and not, that he had.

It is clear from the quotation set out that the witness misunderstood several of the questions asked him, as is indicated by his answers; and further, that notwithstanding he had testified a number of times before in the course of his direct and cross examination that his conversation with Dwyer was before any of the entry-men had filed, he makes no attempt here to hedge or to quibble to shift the dates.

There would be nothing unusual in Dwyer making the agreement with Steffey, that the latter testified to, before he had gone to the lands in company with Steffey, because Steffey had worked for him, and he knew that Steffey knew as much about the quantity and quality of the timber upon the lands as he did. Moreover, as has been said, Dwyer had surely been upon the Myers claim, the first of the group entered, because he contested the homestead upon which the timber and stone entry was filed by Myers; and that entry, as well as some of the others forming the group, are in townships that Steffey had cruised the year before in assisting to make selections for the State. It is safe to say that at that time Dwyer had been over and cruised every acre of timber land in the State of Idaho.

On redirect examination Steffey testified as follows:

Q. Now, there were two claims that you mentioned that you and Mr. Dwyer went to see some time before final proof. Do you remember which they were?

A. Yes, sir.

Q. Which were they?

A. Mrs. Loney's and Mrs. Jolley's claims.

Q. Now, had you had any talk with Mr. Dwyer about these claims before the entrymen were located?

A. Yes.

Q. Did you tell him anything about them?

A. Yes, sir.

Q. What did you tell him?

A. I told him that they were rather indifferent claims; that they were at that time not exceptionally good locations and described them as near as I could; and finally he told me to locate them anyway (p. 1871).

Again the court comments on the testimony of Chapman, who testified that he thought that Steffey's overdrafts at one time ran up between \$2,000 and \$3,000, and reasons from that, that if he were using the funds of the bank by means of overdrafts purely for Kester and Kettenbach's timber operations, there would be no occasion in which he would require more than \$1,500 to furnish the entrymen the money with which to make proof. The court bases its deduction on what the witness thought was the approximate amount of the overdrafts, and reasons from that with the exactness that would be warranted if Steffey's bank account had been introduced in evidence (pp. 359 to 360).

The court further said:

No explanation is furnished as to why the bank required, and Steffey gave, notes from time to time to cover his overdrafts. Without such explanation it is not apparent why, if Steffey was practically doing business for and as the agent of the president and cashier of the bank, he would give his personal note to the bank for money expended upon their behalf. When

called upon to give a note it would have been a very simple and a very natural thing for him to have said, "This overdraft represents expenditures upon your account, and therefore it is for you and not for me to take care of it" (p. 361).

The court has overlooked the fact that, though Kester and Kettenbach were cashier and president of the bank, respectively, the funds of the bank belonged to the stockholders and the depositors, and notwithstanding that they were using the funds of the bank in their own speculations, they were not only solicitous that their timber dealings would appear regular, but also that they were dealing honestly with the funds of the bank. Under such circumstances it would be neither improbable nor unreasonable for a person bearing the relations to them that Steffey did to give an accommodation note to cover his overdrafts. Moreover, as has been pointed out, several years after Steffey had given the notes Kester and Kettenbach paid the same, as they did with the Jackson O'Keefe notes that had been given to cover overdrafts.

The trial judge had also forgotten the irregular method pursued by the defendants in dealing with the funds of the bank in their own speculative enterprises. It was shown at the trial of Kester, Kettenbach and Dwyer, upon a charge of conspiracy to defraud the Government of the timber lands in suit, at which trial the district judge who decided these cases presided (case No. 1605, this court), that Kester, on April 2, 1906 (at the very time that Steffey was giving notes to cover his overdrafts), requested one Joseph Malloy to purchase two specific timber claims

for him. The arrangements were that Malloy was to pay \$1,800 apiece for the claims; he was to give a note to the Lewiston National Bank in the sum of \$3,600 and check upon that to purchase the claims. Malloy at that time did not have an account with the Lewiston National Bank, but gave a note for \$3,600; purchased the claims, drew two checks for \$1,800 each upon the bank the same day, thereby closing out the account, and turned the claims over to Kester and Kettenbach. Ten days later, April 13, 1906, Malloy requested Kester to return to him his note. This Kester declined to do but gave him the following receipt:

LEWISTON NATIONAL BANK,

Lewiston, Idaho, April 13, 1906.

Received from J. M. Malloy \$3,600.00, full payment for note of \$3,600.00.

GEORGE H. KESTER,
Cashier.

This note was kept in the files of the bank for more than a year, or until July 2, 1907, several days before Kester and Kettenbach retired from the bank, when the note and interest was charged to the timber account of Kester and Kettenbach. Kester and Kettenbach regularly paid interest upon this note, but though the note called for ten per cent they only paid interest at the rate of eight per cent. (*Kester, Kettenbach & Dwyer v. United States*, case No. 1605, pp. 863 to 869, this court; *Kettenbach & Kester v. United States*, case No. 2080, pp. 756 to 764, this court.)

We have on several occasions in the course of this brief referred to portions of testimony in other

cases between the same parties, tried in the same court in which the present cases were tried. The district judge in deciding the present cases has referred to matters of which he has taken judicial cognizance that are not in the record, and for that reason we feel justified in referring to the records of the other cases. The cases referred to have been tried in this court and form a part of the records thereof.

It is well settled that the courts will take judicial notice of the records and proceedings of its own court, but it is doubtful whether an appellate court will go into the record and proceedings of its court in other cases between the same parties in determining a case later brought before that court between the same parties and arising out of the same subject matter. There are cases, however, that seem to hold that this can be properly done.

In *Wilson v. Calculagraph Co.*, 153 Fed., 961, 962, the Circuit Court of Appeals for the First Circuit said:

We have no doubt that we are entitled to take judicial notice of our own records, especially where the facts constitute a part of the same litigation. (*Cushman Co. v. Goddard*, 95 Fed., 664, 665, and authorities there cited.) This reference is to our own opinion passed down on June 18, 1899, and it sufficiently states the rule without regard to later decisions in which the same rule has been stated.

The District Court held that Kester and Kettenbach were not aware of the illegal understanding or agreement that existed between Robnett and Carrie D. Maris in relation to her entry, and that Kester and

Kettenbach purchased the same in good faith and for value in the ordinary course of business. The court reached this conclusion by giving no weight whatever to the testimony of Robnett and accepting the version given by Kester and Kettenbach as true, and remarks upon the improbability of the story of Robnett who in endeavoring to sell the claim should relate to the prospective purchaser the invalidity of the entry.

Considering the relations that existed between Kester and Kettenbach, Dwyer and Robnett, there is nothing incredible or improbable about them discussing among themselves the methods which they pursued in procuring the various entries to be made, nor can the probability of the rehearsal among themselves of the ethics used in inducing entrymen to make entries for their use and benefit be gauged by the standards that are set for persons engaging in legitimate business. They were all engaged in an unlawful business and it is not unusual for persons so engaged to talk over their practices with others connected with them in the same line of endeavor, no matter how criminal in nature their practices might be. Robnett testified that the relations that existed between him and Kester and Kettenbach were confidential (p. 2328) and that he discussed with them and advised them of all his transactions in regard to timber matters. Robnett was the bookkeeper at the bank and knew that Kester and Kettenbach and Dwyer were using the bank's funds in their personal enterprises. It was he who manipulated the books of the bank and the reports to the comptroller to conceal these transactions. As a matter of

fact, it was necessary for their safety that they take him into their confidence and it was quite natural that they should talk among themselves of all their doings.

Chapman corroborates Robnett in this respect. His testimony on that point is as follows:

Q. Do you know whether or not Robnett advised Kester and Kettenbach of his timber transactions?

A. I don't know whether he advised them fully or not, but I know that they consulted each other; that is, at least he told them of his transactions.

Chapman further stated that the timber lands of all the parties, Kester, Kettenbach, and Robnett, were marked on the same map and kept at the bank (pp. 2772, 2773).

It will be noticed that in disposing of each of the entries composing the Robnett group, the Emory & Colby group, and the O'Keefe group, the court, after reviewing the testimony relative to each entry, would eliminate Robnett's evidence, and upon the statement made by the entryman, and upon the attending circumstances of the making of the entry, stated that the entry should be carefully scrutinized or that there is some doubt about the validity of the entry, or that the circumstances were merely suspicious, and then hold that there was not sufficient evidence to warrant cancellation of the entry. This suspicion, this doubt, in addition to the evidence of Robnett, should be held to sufficiently corroborate him and give to his testimony some weight.

Again, the court, in referring to the notes that were taken in the name of Robnett for the money furnished the entrymen forming his group, said:

It is quite clear, I think, that the notes were taken in Robnett's name merely as a matter of convenience and for the use and benefit of Kettenbach, who was furnishing the money. The transaction was in no wise concealed. The mortgages were at once placed on record by Kettenbach (p. 312).

We are unable to see how Kettenbach would be inconvenienced by taking the notes in Robnett's name as Robnett assigned the notes, without recourse, to him immediately after taking them. Kettenbach was at the bank equally as much as Robnett. The mortgages, however, were not assigned. It seems to have been the practice for Kester and Kettenbach not to exercise themselves in concealing matters wherein the record did not disclose their connection therewith. They were perfectly willing for the record to show that Robnett was taking mortgages on timber claims, while the notes that the mortgages were given to secure were held by them. It will be observed that the deeds in which Kester and Kettenbach appear as grantees, made in 1904 and 1905, were not of record until from one to two years after their dates.

The case of *Hafemann v. Gross*, 199 U. S., 342, cited by the District Court in the opinion as showing that, even accepting Robnett's statement of the arrangement he had with a number of the entrymen, said entries were not unlawfully made, is not in point in that the Supreme Court decided said case on the ground

that the contract did not give Hafemann any control over the disposition of the claim. In the present cases Robnett testified that he did control the disposition of the claim, and this is corroborated by the fact that every entryman he located conveyed when and to whom Robnett so directed. The fact that the entrymen in some circumstances testified that they would have sold their claims to some one else if such an opportunity had been offered is not controlling.

Under all the circumstances it would seem clear that Kester and Kettenbach acquired the Maris entry with knowledge and notice of its infirmity.

THE IDAHO TRUST COMPANY.

The twelve entries involved in case No. 2210, the titles to which are in the Idaho Trust Company, as grantee of W. F. Kettenbach and Kester, were conveyed to it by deed dated July 6, 1907 (p. 1719). This deed is a warranty deed in fee simple. The claims are the entries of Evans (p. 108, *ib.*), Bishop (p. 109, *ib.*), Newman (p. 110, *ib.*), Dent (p. 111, *ib.*), Smith (p. 113, *ib.*), Morrison (p. 82, *ib.*), Hyde (p. 84, *ib.*), Wilson (p. 160, *ib.*), Greenberg (p. 171, *ib.*), Bingham (p. 145, *ib.*), (Helkenberg, abandoned), and Clute (p. 108, *ib.*).

The number set out opposite each name refers to the page in this brief at which the evidence relative to each particular entry is mentioned. A reading of the pages referred to in connection with the summary of the evidence at the end of groups to which the entries belong will convince the court that said entries are in-

valid. As affecting the credibility of Kettenbach and the weight to be given to his testimony generally, and specially in connection with these entries, we again refer to his evidence to the effect that he would not have loaned the money to the entrymen forming the Robnett group had it not been for the bonus of \$200 that was given in each case, because of the poor security, namely the timber claims for which he advanced the money to purchase. Why then did he purchase three of said claims the same day on which he advanced the money, and the remainder of them shortly thereafter and pay therefor in addition to the amount of the notes and interest from \$25 to \$200 in each case? There was just as much danger of fire destroying the timber when he purchased as there was when he loaned the money.

The bill charges that the Idaho Trust Company acquired title to said claims with knowledge of their invalidity; and that it holds the titles thereto in trust for the use and benefit of Kester and Kettenbach.

The district court held that one of said claims, the Wilson entry was invalid and that the Idaho Trust Company purchased the same with notice thereof; in this connection it said:

I am satisfied from the testimony of the entrymen, reluctantly given, that, while there was *no express* agreement, there *was a perfect understanding* between him and the defendant Dwyer, *acting as the agent for Kester and Kettenbach*, that *all expenses* incident to the acquisition of title should be paid by Dwyer, and that the entryman was to receive \$150.00, in considera-

tion of which he was, upon acquiring title, to convey the same to Kester and Kettenbach. It is not necessary to decide whether or not Kester and Kettenbach had any actual knowledge of the arrangement with *Dwyer*; *Dwyer being their agent*, they are charged with notice. Nor is it thought that the Idaho Trust Company stands in the position of an innocent purchaser. Its chief officer, the defendant Frank W. Kettenbach, is an uncle of William F. Kettenbach, and was upon friendly, if not intimate, terms not only with W. F. Kettenbach, but with Kester, Dwyer and Robnett. Prior to the time the trust deed or mortgage was taken, the validity of this entry had been called into question by indictments filed in this court, and by criminal trials at a comparatively short distance from Lewiston, where the Trust Company was engaged in business, the trials resulting in the conviction of Robnett, Dwyer, Kester and William F. Kettenbach. The trials *attracted wide attention*, and it is *hardly conceivable that, under the circumstances*, the officers of the Trust Company were ignorant of the fact that the validity of this entry was being assailed by the Government. Taking into consideration all of the circumstances, including the relation of the parties, I think it must be held that the facts were sufficient to put the Trust Company upon inquiry, and that it took the title at its peril. It is therefore held that the patent should be cancelled (pp. 288, 289).

We shall show that it took title to all the other entries above mentioned also with notice and knowledge that they were unlawfully made. •

On July 23, 1907, the defendants William F. Kettenbach and George H. Kester and the Idaho Trust Company executed what is called a trust agreement, reciting the deed of July 6, 1907, and defining the terms and conditions upon which the trust company should hold the title to the real estate conveyed to it by said deed. The trust agreement is executed on behalf of the Idaho Trust Company by Frank W. Kettenbach, its president.

Under the terms of said trust agreement, the Idaho Trust Company has practically no powers whatever. It is to hold the property in trust for Wm. F. Kettenbach and Geo. H. Kester, their heirs, executors, administrators and assigns. There is no power to sell any portion of said real estate except at such prices and upon such terms as Kester and Kettenbach, in writing, shall direct.

It is merely to hold the record title of said property until Kester and Kettenbach shall see fit to pay whatever notes they at that time had outstanding against them in the hands of the Idaho Trust Company or the Lewiston National Bank. Kester and Kettenbach could sell any or all of said tracts of land to whomsoever they saw fit at such prices and under such conditions as they thought best, the Idaho Trust Company having no voice in that matter other than to demand that the proceeds of such sales be delivered to it. There is no provision for a sale in default of payment of any notes of Kester and Kettenbach it might hold, no matter how long past due said notes might be. In other words, the effect of the trust agreements, and

hence of the deeds, is that said company merely holds the record title to said lands (p. 192).

The record further shows that at the date of the deed of Kester and Kettenbach to the Idaho Trust Company and at the date of the trust agreement, Wm. F. Kettenbach was not indebted either to the Idaho Trust Company or to the Lewiston National Bank in any sum whatever, nor was any advance made to him by either institution until after one of the present causes was filed involving the property conveyed, and in which Frank W. Kettenbach, with whom the conveyances were negotiated, was the party and had been served with a subpoena.

Under the terms of the trust agreement the undivided half interest of Kettenbach in said property was in no way to be liable for any indebtedness which had been, or that might thereafter be, incurred by Kester, nor was Kester's interest in said lands to be liable for any indebtedness that might be incurred by Kettenbach.

Said agreement is not of record.

At the time of the execution of said deed of July 6, 1907, W. F. Kettenbach and George H. Kester were then, and for 10 years prior thereto had been, president and cashier respectively of the Lewiston National Bank; that at the date of execution of said deed Frank W. Kettenbach, the uncle of William F. Kettenbach, was, and for five years prior thereto had been, the president of the Idaho Trust Company. The day following the execution of said deed, and before the same had been recorded, W. F.

Kettenbach and George H. Kester resigned their positions from the Lewiston National Bank, and Frank W. Kettenbach on the same date was made the president of the Lewiston National Bank, and retained the presidency of the Idaho Trust Company. E. C. Smith, secretary of the Idaho Trust Company, succeeded Kester as cashier of the Lewiston National Bank. On the day W. F. Kettenbach retired from the bank he disposed of his stock to Frank W. Kettenbach, and on the day of the execution of said deed and of said trust agreement W. F. Kettenbach was not indebted to either the Lewiston National Bank or to the Idaho Trust Company, and said instruments were not given to secure any indebtedness of W. F. Kettenbach then existing (p. 3660), and W. F. Kettenbach does not now owe anything under the trust agreement (pp. 1917, 1918).

Frank W. Kettenbach had the management of the affairs of the Idaho Trust Company, and W. F. Kettenbach and Kester managed the Lewiston National Bank while they were president and cashier respectively (p. 1738), and after Frank W. Kettenbach became president of the Lewiston National Bank he had the sole management of that institution (p. 1739).

During the years 1902 to 1907 inclusive W. F. Kettenbach and his sister and George H. Kester owned about eighty per cent of the stock of the Lewiston National Bank (pp. 1958-1966). At the date of the execution of said deed and trust agreement Frank W. Kettenbach and his relatives and E. C.

Smith owned and controlled more than fifty per cent of the stock of the Idaho Trust Company (pp. 1896-1898).

In July, 1905, Jackson O'Keefe, George H. Kester, William F. Kettenbach and William Dwyer were indicted (No. 605) in this court for conspiracy to defraud the United States of its valuable timber lands, and the claims specifically mentioned therein as being unlawfully entered were the entries of Charles W. Taylor, Edgar H. Dammarell, Edgar J. Taylor, and Joseph H. Prentice (pp. 2954, 3992).

On July 13, 1905, W. F. Kettenbach, George H. Kester, and William Dwyer were again indicted (No. 607), charged with conspiracy to defraud the United States of its valuable timber lands, and the entries specifically mentioned therein were those of Rowland A. Lambdin, Fred W. Schaeffer, and Ivan R. Cornell (pp. 2954, 4000).

On November 6, 1905, W. F. Kettenbach, Kester and Dwyer were again indicted (No. 615) for conspiracy to defraud the United States of a large amount of its valuable timberlands, the entries specifically mentioned in that indictment being those of Edward M. Lewis, Hiram F. Lewis, Charles Carey, and Guy L. Wilson (pp. 2954, 3982).

On November 6, 1905, William Dwyer was convicted (No. 616) for subornation of perjury in connection with the entries of Hiram F. Lewis, Charles Carey, and Guy L. Wilson (p. 2959).

On November 6, 1905, Fred Emory, C. W. Colby, George H. Kester and William F. Kettenbach were

indicted (No. 618) for conspiracy to defraud the United States of its valuable timberlands, the entries specifically mentioned in that indictment being those of James C. Evans and Charles Dent.

On November 6, 1905, William B. Benton, Clarence W. Robnett, and W. F. Kettenbach were indicted (No. 617) for conspiracy to defraud the United States of a large amount of its valuable timberlands, the specific entries referred to therein being those of John H. Long, Francis M. Long and Benjamin F. Long.

In case No. 615 Joseph Alexander, vice president of the Lewiston National Bank, and Frank W. Kettenbach were sureties on the bond of W. F. Kettenbach, dated July 9, 1906; and Joseph Alexander was surety on the bond of Kester. (See certified copy of bond filed with clerk of this court.)

In case No. 617 Frank W. Kettenbach and Joseph Alexander were sureties on the bond of W. F. Kettenbach, and Frank W. Kettenbach and E. C. Smith were sureties on the bond of William B. Benton. (See certified copy of bond filed with clerk of this court.)

In case No. 618 Frank W. Kettenbach and Joseph Alexander were sureties on the bond of W. F. Kettenbach, and Joseph Alexander was surety on the bond of Kester, all of said bonds being given in January, 1906. (See certified copy of bond filed with clerk of this court.)

On June 17, 1907, W. F. Kettenbach, Kester and Dwyer, having been convicted in case No. 615, and Dwyer in No. 616, were sentenced to imprisonment and a fine (pp. 2955 to 2962).

From the petition filed in said district court in May, 1910, by Frank W. Kettenbach, and supported by his affidavit, praying a change of place of trial from the division of the district where these lands are situated, and where Frank W. Kettenbach resides, on the ground of hostility against him and W. F. Kettenbach and Kester, by reason of certain newspaper publications commenting on their timber transactions in 1904 down to 1910, it would appear that everybody in the northern section of the State of Idaho were given notice and placed on inquiry as to the Kester-Kettenbach timber deals (p. 4032). E. C. Smith stated that he knew of the conviction of Kester, W. F. Kettenbach and Dwyer in 1907, and that it was a matter of general knowledge in Lewiston (p. 1957). Frank W. Kettenbach testified that at the time the Government was investigating the timber transactions of Kester, W. F. Kettenbach and Robnett, and the grand jury returning indictments against them, and the prosecutions were in progress he had a great deal of sympathy for the defendants, and during the period he and Robnett often met on their way to the office in the morning and in returning to their homes in the evening, and discussed said cases, and that these conversations between Frank W. Kettenbach and Robnett occurred before Kettenbach bought an interest in the Lewiston National Bank in July, 1907 (pp. 3571 to 3573); that he, Frank W. Kettenbach, was a witness for the defense at the land fraud trials of Kester, Kettenbach and Dwyer, at Moscow, in 1907 (p. 3578), and knew of the convictions of Kester, Kettenbach

and Robnett, and that they resigned their positions in the bank on account of those convictions (pp. 3578 and 3590); and that Frank W. Kettenbach lived next door to W. F. Kettenbach during all this period (p. 3659). Frank W. Kettenbach also testified that at the time the trust agreement was executed W. F. Kettenbach did not owe the bank anything (p. 3592). At page 3602 of the record he testifies that he knew there was a *lis pendens* on some of the claims mentioned in the trust agreement, but that there was sufficient amount of other land included in the agreement, and he was satisfied with the security.

Frank W. Kettenbach and E. C. Smith were incorporators of the Idaho Trust Company, and E. C. Smith subscribed 350 shares of the stock of that company; W. F. Kettenbach, 100 shares; Elizabeth White, 50 shares; Grace K. Pfafflin, 50 shares; Amy G. Kettenbach, wife of Frank W. Kettenbach, 10 shares; Otto Kettenbach, nephew of F. W. Kettenbach, 15 shares; and James E. Babb, 5 shares (pp. 1890-1893). In the year 1908, 910 shares of the total 1,000 shares of the Lewiston National Bank stock were purchased and owned by the Idaho Trust Company (p. 1966).

The entries of William McMillan and Hattie Rowland are also involved in case No. 2210, and the evidence concerning said entries is recited at pages 172, 174, 178, *ib.*, and we think is sufficient to justify the cancellation of the patents issued for them.

McMillan and Rowland conveyed their claims to Kittie E. Dwyer April 9, 1906, and Kittie E. Dwyer conveyed the titles to the same, by warranty deed, to

the Idaho Trust Company December 31, 1908 (pp. 1501, 1502, 1508, 1509). On December 31, 1908, Kittie E. Dwyer and William Dwyer executed with the Idaho Trust Company a trust agreement reciting the conveyance in fee simple to said company and the terms of said agreement, being practically the same as those in the agreement between Kester and Kettenbach and the said Trust Company of July 23, 1907 (p. 1935). Frank W. Kettenbach negotiated with the Dwyers relative to said deed and trust agreement (p. 1920). On December 30, 1907, Dwyer and wife gave a mortgage to the Lewiston National Bank on said claims, but at that time a notice of lis pendens was of record and said claims were involved in what is now case 2209 (pp. 1502, 1508, 1509), and at the date of the conveyance by the Dwyers to the Idaho Trust Company of said claims said lis pendens and notice thereof was still subsisting of record. Dwyer and Frank W. Kettenbach were parties to the suit and Frank W. Kettenbach had been served with subpoena.

Under the circumstances herein detailed, it is clear that Frank W. Kettenbach had knowledge of the conditions under which said entries were made and perfected or at least had and therefore under all the circumstances the Idaho Trust Company can not be held to be an innocent purchaser.

It has been well said that an absolute deed with a separate defeasance will always appear with the face of fraud. In view of the conditions that existed at the dates of the execution of said instruments, aside and apart from the badge of fraud that attaches to

them by reason of the said conveyances, it is clear that said conveyances were made in order to get the record title out of Kester, Kettenbach, and Dwyer and of record in the name of some other person or corporation, and thereby make it appear that said parties had parted with all of their interest in said lands. This was done in the hope that they would thereby escape the anticipated attack upon them on the ground of fraud and the grantees would be able, in the event of such proceedings, to set up the defense of bona fide purchaser.

THE LEWISTON NATIONAL BANK.

The titles to the entries of Van V. Robertson, Drury M. Gammon, and Robert O. Waldman are in the Lewiston National Bank. The evidence relating to the Robertson entry is set out at page 51, *ib.*; as to the Gammon claim at page 92, *ib.*; and to the Waldman claim at page 60, *ib.*; and shows all of said entries to be invalid. The district court held that the Waldman entry was unlawfully made and that the Lewiston National Bank took title to the same under such conditions that it can not claim the protection of an innocent purchaser and ordered the patent be canceled (pp. 289, 290).

As to the Gammon entry, the court was inclined to think that it was made in fraud of the statute, but that the Lewiston National Bank acquired title to the same as an innocent purchaser. The court reached this conclusion by giving credence to the version of the transaction given by Kester in preference to that of Robnett

(p. 305), notwithstanding Robnett was strongly corroborated. A reading of the evidence at the pages here cited will convince the court that the bank did not take title to the Gammon and Robertson entries as an innocent purchaser.

THE CLEARWATER TIMBER COMPANY.

The Clearwater Timber Company took title to the entries of William B. Benton, Joel H. Benton, Pearl Washburn, William Haevernick, Alma Haevernick, and Geary Van Artsdalen; and the bill of complaint in case No. 2210 alleges that said company took and now holds the title to said claims knowing the entries to be invalid and voidable at the suit of the United States. As hereinbefore stated we abandon the Van Artsdalen entry.

The evidence showing that said other entries are invalid is set out in this brief at the following pages: William B. Benton's entry (p. 46, *ib.*); the Joel H. Benton entry (p. 47, *ib.*); the Pearl Washburn entry (p. 50, *ib.*); and the Haevernick entries (p. 128, *ib.*); and in the summary of the evidence concerning the Robnett group (p. 96, *ib.*).

The district court was unwilling to hold the William B. Benton entry for cancellation because it believed the version of the transaction recited by Benton and Kettenbach in preference to that given by Robnett. The court said:

He (Kettenbach) further testifies that Robnett had some timber claims that he was trying to dispose of, but being unable so to do appealed to Kettenbach to assist him, and, for

the purpose of enabling him to sell the lands for Robnett, the transfer was made to Mrs. White, who later transferred to the Clearwater Timber Company. Robnett testifies that he told Kettenbach all about his illegal arrangements with Benton. This is denied by Kettenbach. No reason is given by Robnett why, when he was endeavoring to sell the land, *he should have disclosed facts invalidating the title, and it would seem quite irrational for a vendor voluntarily and needlessly to make known the existence of facts which, if true would disclose the invalidity of the title which he is trying to sell.* To hold the entry invalid, Benton's testimony must be rejected, and Robnett's believed. *Benton is Kettenbach's cousin, and it may be assumed that if he had an illegal contract he would be in a general way interested in concealing the facts, but whatever may be the indirect interest of Benton and Kettenbach in the result of the litigation, I think it must be held that in the absence of circumstances tending to make Robnett's story more probable than theirs, the evidence is insufficient to warrant a cancellation of the patent (pp. 292, 293).*

As hereinbefore stated there was nothing irrational in Robnett telling Kettenbach the condition upon which he had procured Benton to make the entry, as they were all engaged in the same business—the procuring of timber claims unlawfully; and all were acting in concert in that business.

As to the Joel H. Benton entry, the court said:

Upon the whole, I would be inclined to hold the entry for cancellation were it not for the rights of the Clearwater Timber Company as an innocent purchaser. While the point is not entirely free from doubt, it is thought that this company did not have such knowledge of the circumstances under which the entry was made, or such notice of the claims of the Government, as to put it upon inquiry. It is true the purchase was made after much publicity was given to the criminal prosecutions against Robnett, Dwyer, Kester, and W. F. Kettenbach, and it is also true that one of the agents of that company testified at one of the criminal trials, but it does not appear that he or any other officer of the company was aware that this particular claim was involved in the criminal prosecutions, or that it was called into question by the Government. The witness Robnett testifies that the transfer was made by him to Elizabeth White upon the suggestion of the defendant William F. Kettenbach that the timber company would not buy the claim from him, but would buy the same from Elizabeth White. This is denied by Kettenbach, but if we assume it to be true, such a statement on the part of Kettenbach is not competent as proof against the timber company, and there is no evidence that any *resident agent* in Idaho of the timber company had *any knowledge at the time* the agreement to purchase was made that the title came through Robnett, or that he had ever had anything to do with it.

* * * In view of all the circumstances, it is thought that the relief prayed must be denied (pp. 316, 317, 318).

The agent of the Clearwater Timber Company, who testified at trials above mentioned, was the *resident agent* and the *ONLY* agent that said company had in Idaho. He testified that it was a part of his duties to purchase timberland in said State. At the trial mentioned Joel H. Benton also testified and admitted on the witness stand that the very same entry now under discussion was entered upon a prior agreement with Robnett.

From 1902 down to the present time Nathaniel Brown has been the business agent of the Clearwater Timber Company in the State of Idaho and has been engaged in purchasing timber for said company during that period.

As mentioned in the recital of the evidence referred to, and on page 2313 of the record, the Benton claims were conveyed to Robnett, by him to Elizabeth White, and by Elizabeth White to the Clearwater Company. The conveyances to Elizabeth White were executed the date that Kester and Kettenbach and Robnett resigned from the bank. Brown negotiated for the Benton claims at the bank with William F. Kettenbach (p. 1650), and because of the investigation of the timber dealings of Kester, Kettenbach, and Robnett they could not negotiate with the Clearwater Timber Company for the sale of the claims unless they were deeded to Mrs. White. The deeds to the Benton claims were executed to the Clearwater Tim-

ber Company September, 1907, after the conviction and sentence of Kester, Kettenbach, and Robnett.

The negotiations for the sale of the Pearl Washburn claim were conducted by John E. Chapman, teller of the Lewiston National Bank, and W. F. Kettenbach with Nathaniel Brown. This deed was executed the day before Kester and Kettenbach retired from the bank.

Brown purchased the claim of the Haevernicks for the Clearwater Timber Company from F. W. Kettenbach. At the time of the acquisition of these claims by the Clearwater Company, Brown had been well acquainted with Dwyer, Kester, and Kettenbach for a number of years, and remembers the conviction of them at Moscow in 1907 for conspiracy to defraud the United States of its timberlands, and also knew of the conviction of Dwyer in the fall of 1906 for subornation of perjury growing out of his timberland transactions (pp. 1646 to 1649).

At the trials of Kester, Kettenbach, and Dwyer, Brown was a witness on behalf of the Government (p. 1676).

Q. And that trial was of almost State-wide interest?

A. Yes; people heard generally of it.

Q. You never knew of trials in this State that were so much talked of as those trials, did you?

A. Well, I didn't hear a great deal of the talk, Mr. Gordon. I was in the woods most of the time.

Q. But even people in the woods knew it was going on, didn't they?

A. Yes, sir.

The following circumstances tend to corroborate Robnett's statement that Elizabeth White was merely the conduit through whom the title to said claims passes to the Clearwater Timber Company to satisfy the agent of said company, who declined to take the claims either from Kester and Kettenbach or Robnett because of their convictions and sentences, but would take the title to said claims from Mrs. White.

The claims of William B. and Joel H. Benton and two other claims were conveyed to Robnett and by him conveyed to Elizabeth White July 8, 1907, the day Kester and Kettenbach retired from the bank and the day after they had conveyed their timber claims to the Idaho Trust Company in the circumstances herein mentioned. Elizabeth White conveyed said claims to the Clearwater Timber Company September 4, 1907.

William F. Kettenbach testified that he purchased the claims for Mrs. White and paid for them all that they were worth (p. 3435).

The testimony of Mrs. White indicates that she knows nothing about the claims other than that she was the "third party" in the transaction with the Clearwater Timber Company (pp. 767, 768).

When two of the claims were conveyed in September, 1907, to the Lewiston National Bank, Frank W. Kettenbach, who at that time was president of the bank, paid the purchase price of said claims to Robnett and not to Mrs. White (pp. 3569 to 3571, 4193).

The importance of Mr. Brown, the agent of the Clearwater Timber Company in Idaho, can not be minimized.

It seems immaterial whether or not the president, the secretary, and the assistant secretary of the Clearwater Timber Company resided at St. Paul and Tacoma, or whether or not Brown ever read the abstracts of title, or had to depend upon a Mr. Davies, in the State of Washington, to honor his drafts when he purchased timber claims for the Clearwater Timber Company. He was the only agent of the Clearwater Timber Company in Idaho and it was he who negotiated for and purchased the timber claims in suit, and notice to him, or his knowledge, was constructive knowledge and notice to the company he represented, and the evidence points strongly to the fact that he had knowledge and notice of the illegality of the claims in suit purchased by him.

The evidence set out at page 57 of this brief concerning the entry of Soren Hansen will show beyond question that the entry was made pursuant to a prior agreement or understanding between the entryman and Robnett, as is denounced by the statute; and the circumstances surrounding the transfers of title to the claim will be further proof of the relations that existed between Robnett, Kettenbach, and the agent of the Clearwater Timber Company, and indicating a disposition of the latter to assist Kettenbach to conceal the record title to land Kettenbach had unlawfully obtained.

As will be seen at the page referred to, the Hansen claim has had a varied career. Hansen, at the request of Robnett, first executed a deed for the claim in blank. He then made another deed to Mrs. Thatcher of the claim. He also executed a deed for the claim to W. F. Kettenbach and one to the Clearwater Timber Company, the latter at the request of Robnett and W. F. Kettenbach, and being the only deed to the claim of record. The Clearwater Company has never purchased the claim or given any consideration for the deed or made claim to the property, but has executed a deed for the same to W. F. Kettenbach, which, at the time of the taking of the testimony in these causes, was brought into court by the attorney for the Clearwater Timber Company and it was read into the record. The Clearwater Timber Company did not pay taxes on the Hansen claim (p. 1524). Brown, the agent of the Clearwater Company, in relating the transactions concerning this claim, said that he agreed to purchase the Hansen claim from W. F. Kettenbach; that the deal was not consummated, because there was a *lis pendens* of record against it; that he submitted the matter to the company's attorney and declined to accept the deed from Kettenbach, and neither he nor his company recorded the same nor claimed any interest in it. The deed was recorded by W. F. Kettenbach. Kettenbach requested him to have the company reconvey the title to Kettenbach (p. 1641).

The quitclaim deed from the Clearwater Timber Company to W. F. Kettenbach produced in court as

herein stated is dated July 12, 1910, and recites that the deed from Kittenbach to the company was placed of record by a mistake, and for that reason the quit-claim deed is executed. The deed was forwarded to the attorney for the company, who is also its attorney in these cases, with a letter stating: "We are inclosing you a deed from the Clearwater Timber Company to W. F. Kettenbach, duly executed. E. N. Brown sends us this deed for execution, with an explanation of why it should be so deeded, and informs us you are aware of the circumstances leading up to our having the title thereto and why it should be deeded back to Mr. Kettenbach" (p. 1666).

Brown further testifies that he wrote the president of the company a letter saying that the deed had been recorded by mistake and that the land did not belong to the company (p. 1669). Brown says that he had notice that something had been filed against the Van Artsdalen claim and the other claims he had purchased (p. 1671), and that Kettenbach asked him to see their attorney about taking deeds under *lis pendens* "and some other deeds with notations of filings against them" (p. 1672).

W. F. Kettenbach, testifying relative to the Hansen claim, says that he paid the mortgage and gave Robnett \$60 to pay to Hansen, and that Hansen was paid the \$60 in his presence; that he told Brown of the *lis pendens* and Brown declined to take the claim; that he still owns the claim, and that he recorded the deed to the Clearwater Timber Company to protect himself (pp. 1692, 1693). Under all the

circumstances the patent for this deed should be canceled.

Under the circumstances the Clearwater Timber Company is not an innocent purchaser, but took the claims with notice.

The claim of John E. Nelson was conveyed to E. W. Thatcher May 18, 1908, and at that date a notice of his pendens was of record involving said claim (p. 1505; pp. 54, 96, ib.).

**KINSFOLK OF KESTER AND KETTENBACH WHO HOLD TITLES
IN TRUST FOR THEM.**

The claims of Wm. J. and Mamie P. White were conveyed to Elizabeth White January 15, 1909, and while notice of his pendens was of record (pp. 1517, 1518; pp. 168, 170, ib.).

The title to the claims entered by Edna P. Kester, Elizabeth White, Elizabeth Kettenbach, and Martha E. Hallett is still in them of record. The details of the making of each of these entries, together with those of William J. and Mamie P. White, are set out and besides the facts that they were taken to the timber by Kester and referred to as Kester's party; that the money for several of them was furnished by Kester or Kettenbach; that the taxes on them had been paid by Kester and Kettenbach; that they were included in the option signed by Kester in 1906, with the exception of the Hallett entry; and are included in an option given by W. F. Kettenbach and Kester November 23, 1909 (pp. 2135, 3948; pp. 164, 167, 168, 171, 178, ib.).

In fact, W. F. Kettenbach and Kester have exercised ownership over these claims ever since they were first entered.

The evidence warrants a cancellation of said entries.

But as said claims are involved in cause No. 2210 (p. 24 of brief).

POTLATCH LUMBER COMPANY.

The claims entered by Ivan R. Cornell, Rowland A. Lambdin, and Fred W. Shaeffer were conveyed to Kester & Kettenbach, and by the latter to the Potlatch Lumber Company in 1903 and 1906, and there is little in the record to show that the Potlatch Lumber Company is not an innocent purchaser.

LAW OF CONSPIRACY.

In *United States v. Cassidy* (67 Fed. Rep., 689) the court said:

“and while it is necessary, in order to establish a conspiracy, to prove a combination by two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons in any man-

ner, or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of the said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, and was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons to effect an unlawful end is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conspired. * * * Furthermore, where several persons are proved to have conspired together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy. It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proved, are as much respon-

sible for such declarations and the acts to which they relate as if made and committed by themselves. This rule, you will understand, applies to the declaration of the co-conspirator, although he may not be under prosecution, his declaration being equally admissible with those of one under indictment and prosecution.”

Followed in *Thomas v. United States* (156 Fed., 910).

EVIDENCE.

An act innocent in itself may be a step in a criminal plot.

Aben v. Wisconsin (195 U. S., 206).

Declaration of co-conspirators, evidence against all.

Connecticut Mutual Life v. Hellman (188 U. S., 218).

United States v. Cassidy (67 Fed. Rep., 698).

United States v. Francis (144 Fed. Rep., 523).

United States v. Richards (149 Fed. Rep., 444).

United States v. Alkon (163 Fed. Rep., 810).

Acts of others admissible if made in carrying conspiracy into effect.

Clune v. United States (159 U. S., 590).

Thomas v. United States (156 Fed. Rep., 910).

Fraud is not often proved by direct testimony. A preconcerted plan to do an unlawful act must, from the nature of the case, be usually established by in-

ferences drawn from the relations of the parties, from the acts done, and from the results achieved.

Thomas v. United States (156 Fed. Rep., 910).

Act of one co-conspirator, act of all.

Ex parte Black (147 Fed., 838 and 840).

Logan v. United States (144 U. S., 263).

Brown v. United States (150 U. S., 93).

Not necessary to show formal agreement.

Reilly v. United States (106 Fed., 896).

Davis v. United States (107 Fed., 755).

United States v. Cassidy (67 Fed., 698).

Thomas v. United States (156 Fed., 912).

It is not necessary that the conspiracy originated with the defendants; or that they met during the process of its concoction; for every person entering into a conspiracy or a common design already formed, is deemed in law a party to all the acts done by any of the other parties before or afterwards in furtherance of the common design.

Greenleaf on Evidence, vol. 3, sections 92, 93, and 95.

Jayne v. Loder (149 Fed., 21 and 30).

BONA FIDE PURCHASER.

The essential elements which constitute a bona fide purchase are three—a valuable consideration, the absence of notice, and the presence of good faith.

Pomeroy's Equity Jurisprudence, section 745.

United States v. California & Oregon Land Co. (148 U. S., 31).

United States v. Winona & St. Paul Railroad Co. (165 U. S., 463).

Not only must there be a valuable consideration in fact, but it must be paid before notice of the prior claim. Notice after the agreement for the purchase is made, but before any payment, will destroy the character of the bona fide purchaser.

Pomeroy's Equity Jurisprudence, section 750.

Boone v. Chile (10 Peters, 211).

Balfour v. Hopkins (93 Fed., 564 and 570, Ninth Circuit).

The rule is universal and elementary, that if a purchaser in any form *receives notice* of prior adverse rights in and to the same subject matter before he has completely acquired or perfected his own interests under the purchase, his position as a bona fide purchaser is thereby destroyed, even though he may have paid a valuable consideration. On the other hand, notice given after his interests have been acquired or perfected produce no injurious affect.

Notice sufficient to prevent the purchase from being bona fide may inhere in the very form and kind of the conveyance itself.

Pomeroy's Equity Jurisprudence, section 753.

If a person is charged with constructive notice of fraud, where the circumstances are such as to enable the court to say, not only that he might have acquired but also that he ought to have acquired the notice with which it is sought to affect him, that he would

have acquired it but for his gross negligence in the conduct of the business in question. Inquiry is made a duty where there is such a feasible state of things as is inconsistent with perfect right in him who proposes to sell.

Wilson v. Wall (73 U. S., 83, 91).

Townsend v. Little (109 U. S., 504, 511).

Crawford v. Neal (144 U. S., 585, 595).

Conceding that the indispensable elements of such a defense are absence of notice of the fraud or defect, good faith, payment of value, and the legal estate, it is not material at what time or in what order the purchaser acquires them. It is only necessary that they all concur in him at the same time. It is *indispensable* to this defense that the consideration should be paid before notice of the defect. But it is not essential that it should be paid before or at the time the title is conveyed. It is sufficient if the payment is *completed* at any time *before notice of the defect is received*. It is not more essential that the legal title should be secured before or at the time when the consideration is paid. It is enough if it is acquired before notice of the alleged fraud or perjury is fastened upon the purchaser.

United States v. Detroit Timber & Lumber Co. (131 Fed., 668, 676; 200 U. S., 321).

PURCHASE FOR VALUE—ANTECEDENT DEBT.

A purchaser of real property or the assignment of a mortgage thereon for an antecedent debt does not make the vendee or assignee a purchaser for a

valuable consideration so as to entitle him to protection against a prior conveyance of, or right in or to, such property.

The reason for the latter rule is that the purchaser has not parted with anything of value. He loses nothing by the transaction. Therefore there is no reason why equity should interfere to protect him against a prior right although he may have taken such conveyance or security without notice thereof.

Gest v. Packwood (34 Fed., 368).

The Elmbank (73 Fed., 610; opinion by Judge Morrow).

Hill v. Hight (79 Fed., 826).

Missouri Broom Manufacturing Co. v. Guymon (115 Fed., 112).

This is a decision by the Circuit Court of Appeals for the Eighth Circuit, and refers to a situation of which it says:

We have been forced to conclude (that certain matter) was in fact inserted in the deed of trust for no other purpose than to furnish a pretext for such a claim as has been made, namely, that such extension of time or payment was a new and additional consideration for the conveyance, such as protects the creditor and arms him with the rights of an innocent purchaser for value. Instead of having the effect intended it really creates grave suspicion that the creditor either knew or suspected that the Broom Company could not transfer a good title to some of the property in its possession which it offered to pledge as security for its debt.

Held that parties were not innocent purchasers.

In *People's Savings Bank v. Bates* (120 U. S., 556; 30 L. E., 754) Mr. Justice Harlan quotes from the opinion of Mr. Justice Storey in *Morse v. Godfrey*, as follows:

This leads me to remark that the bank does not stand within the predicament of being a bona fide purchaser for a valuable consideration without notice, in the sense of the rule upon the subject. The bank did not pay any consideration therefor, nor did it surrender any security or release any debt due either from Reed or Godfrey to it. The transfer from Godfrey was a simple collateral security taken as additional security for the old indebtedness and liability of the parties to the notes described in the instrument of transfer. It is true that, as between Godfrey and Reed and the bank, the latter was a debtor for value and the transfer was valid; but the protection is not given by the rules of law to the parties in such a predicament merely. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities held for the debts and liabilities. But where the bank has merely possessed itself of the property transferred as auxiliary security for the old debts and liabilities, it has paid or given no new consideration upon the faith of it. It is therefore in truth no purchase for value in the sense of the law.

After citing other authorities, Justice Harlan, continuing, said:

Without further discussion of the authorities cited by counsel, all of which have been carefully examined, we are of the opinion that the claim of the bank to be a subsequent mortgage in good faith can not be sustained because the mortgage of February 11, 1881, although first filed, was not given in consideration of its having surrendered or agreed to surrender or to postpone the exercise of any substantial right it had against the mortgagor, but merely as collateral security for past indebtedness. Under such circumstances the mortgage which was prior in time confers a superior right.

In *Loring v. Palmer* (118 U. S., 321; 30 L. E., 211) the Supreme Court held that where the interest of the cestui que trust was not created by the deed to the trustee but by the original contract of purchase in connection with certain contemporaneous correspondence the legal title did not vest in the cestui que trust by virtue of the statute of Michigan abolishing passive trusts, but he merely took an equitable title, and his remedy, if any, is a court of equity and not by ejectment.

When a grantee subsequently acknowledged in writing that he had received the property as security for debt, proved him a trustee.

Safford v. Rantons (12 Pickering, 233).

See also decision Judge Wolverton, Supreme Court of Oregon, July, 1897, in *Perkins v. McCullough* (49 Pac. Rep., 861).

Where one takes a conveyance to pay debts he holds as trustee, and the grantor has an interest in the land conveyed.

Janes v. Throckmorton (57 Cal., 368).

(Instructive decision by Judge Ross.)

See:

Stewart v. Platt (101 U. S., 731).

Sayre et al. v. Weil (15 L. R. A., 544).

Lockett v. Robinson (20 L. R. S., 67).

EQUITIES AGAINST MORTGAGEE.

As a general rule an equitable mortgagee takes subject to all the equities affecting the mortgagor.

11 Encyc. Law, 142.

Parker v. Clark (30 Beav., 54).

Maningford v. Coventy Union Bank (8 W. R., 729.)

Shropshire Union R. v. Reg. L. R. (7 H. L., 496);

The purchaser has no right to shut his eyes and his ears to the inlet of information and then say he is a bona fide purchaser.

Simmons Creek Coal Co. v. Doran (142 U. S., 413, 437).

Cook on Corporations (Sec. 726, sixth ed.).

McCaskell v. United States (Advance Sheets United States Supreme Court Reports Apr. 1, 1910, p. 386).

California Consolidated Mining Co. v. Manly (81 Pac., 50).

Hoffman Steam Coal Co. v. Cumberland Coal Co. (16 Md., 456).

Bennett v. Minot (28 Oreg., 346).

CAN A GRANTEE UNDER A QUITCLAIM DEED BE A BONA
FIDE PURCHASER ?

A quitclaim deed conveys interest of the grantor only; not the land. The purchaser under such a deed is not a bona fide purchaser without notice.

Richards v. Snyder and Crews (11 Oregon, 501).

Baker v. Woodward (12 Oregon, 3).

American Mortgage Co. v. Hutchinson (19 Oregon, 334).

A quitclaim deed in the chain of title to property is sufficient to put a purchaser on inquiry.

Baker v. Woodward (12 Oregon, 3).

Contra: *Boydton v. Haggert* (120 Fed., 819, 823, 825).

See also *United States v. California & Oregon Land Co.* (148 U. S., 31).

Stanley v. Schwalby (162 U. S., 277).

One who acquires his title by a quitclaim deed cannot be regarded as a bona fide purchaser without notice.

May v. Leclaire (78 U. S., 217, 232).

Oliver v. Piatt (3 Howard, 333, 410).

Van Rensselaer v. Kearney (11 Howard, 297).

Villa v. Rodriguez (12 Wallace, 323, 339).

Deckerson v. Colgrove (100 U. S., 578).

Baker v. Humphrey (101 U. S., 494).

Hanrick v. Patrick (119 U. S., 156).

Hastings v. Nissen (31 Fed., 597).

Gest v. Packwood (34 Fed., 368, 372).

The doctrine of the cases last above cited was qualified in the case of *The United States v. California & Oregon Land Company* (148 U. S., 31), but not sufficiently to disturb the effect of the former in cases in which the relations between the grantor and the grantee were such as existed between O'Keefe, Kester, and Kettenbach.

See also *Moelle v. Sherwood* (148 U. S., 21).

United States v. California & Oregon Land Co. (49 Fed., 496).

NOTICE.

Notice to an agent in the business or employment which he is carrying on for his principal is a constructive notice to the principal himself, so far as the latter's rights and liabilities are involved in or are affected by the transaction.

Section 666, 673, Pomeroy's Equity Jurisprudence, vol. 2, third edition, and notes to said section.

Wood v. Rayburn (18 Oregon, p. 1).

Smith v. Ayer (101 U. S., 120).

There is an important exception to the foregoing rules, as follows:

It is settled by a series of decisions possessing the highest authority that when an agent or attorney has in the course of his employment been guilty of an actual fraud, contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing

the facts from his own client, then, under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed. In such a case a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice.

Section 675, Pomeroy's Equity Jurisprudence.

Surety Co. v. Pauly (170 U. S., 133).

Henry v. Allen (151 New York, 1).

36 L. R. A., 658.

Benedict v. Arnoux (154 New York, 715).

Gunster v. Scranton Illum, etc. (181 Penns. State, 327; 59 Amer. State Reports, 650).

Thompson Huston Electric Co. v. Capital Electric Co. (65 Fed., 341).

Hart v. Beer (74 Fed., 592).

Central Coal & Coke Co. v. Geo. S. Good & Co. (120 Fed., 793, 798).

See also a large number of cases cited on page 798 of last citation, and to notes of section 675, Pom. E. J.

Fidelity & Deposit Co. v. Courtney (186 Fed., 342, 362).

The courts have carefully confined the operation of the above exception to the condition described where a presumption necessarily arises that the agent did not disclose the facts to his principal because he was committing such independent fraud that concealment was necessary to its perpetration. It has never been extended beyond these circumstances. It follows, therefore, that every fraud of

an agent, in the course of his employment and in the very same transaction, does not fall within this exception; and most emphatically it does not apply when agent's fraud consists merely in his concealment of material facts within his own knowledge, from his principal.

Section 675, Pomeroy's Equity Jurisprudence.

Absolute deed given with a separate defeasance will always appear with a face of fraud.

Baker v. Wind (1 Ves. Sen., 160).

Jones on Mortgage (sec. 243).

In some States though the mortgage is by a deed absolute in form, the grantee acquires no legal title to the land.

Jones on Mortgage (sec. 342 C).

But in other States in which a formal mortgage is held not to pass the legal title, a deed absolute in form, intended to operate as a mortgage does not pass such title.

Jones on Mortgage (sec. 342 C).

THE IMPEACHMENT OF WITNESSES.

Certain objections interposed by the defendants in the examination of witnesses seem intended to suggest that the Government, having called the entry-men, is bound by what they say. This suggestion, if intended to be urged, proceeds upon a radical misconception of the rule of evidence respecting the impeachment of a witness by the party calling him.

The rule of evidence in any case goes no further than to inhibit an impeachment of the general reputation of a witness called by the party. If it ever was the law that a party was precluded to contradict his own witness, the rule in that form has been obsolete for a century; and for that period, at least, it has been competent to show the falsity of the party's own witness, even though such showing should incidentally reflect upon the veracity of the witness.

It is exceedingly clear that the party calling a witness is not precluded from proving the truth of any particular fact, by any other competent testimony, in direct contradiction to what such witness may have testified; and this, not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief.

1 Greenleaf on Evidence (sec. 443).

The primitive notion, that a party is morally bound by the statements of his witnesses, no longer finds defenders, although its disappearance is by no means very far in the past. In the early 1800's the judges were still engaged in repudiating this false notion of the basis of the rule against impeaching one's own witness.

Wigmore on Evidence (vol. 2, sec. 897).

Compare Wigmore on Evidence (vol. 2, sec. 898); *Alexander v. Gibson* (2 Campbell, 555); *Bradley v. Ricardo* (8 Bingham, 58); *Brown v. Bellows* (4 Pickering, 187); *Whitaker v. Salisbury* (15 Peck, 545).

Certainly the supposed rule of evidence is subject to the qualifications that the witness, whether or not he is impeachable by the other side, may be discredited by the court. And this is so especially where the witness himself supplies the material for his own impeachment.

In *McLean v. Clark* (31 Fed. Rep., 501), decided in 1887, District Judge Brown, since a Justice of the Supreme Court of the United States, said:

It is insisted, however, that as *McLean* (the plaintiff) was called as a witness by the defendants, they are bound by his statements that the transaction was bona fide and that Shaw has no interest in this suit. We do not so understand the law. While it is undoubtedly true, as a general rule, that a party offering a witness in support of his case represents himself as worthy of belief and will not be permitted to impeach his general reputation for truth or to impugn his credibility by general evidence, he has never been considered as bound by his general statements as to motives or intention, or his bona fides in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify. Particularly is this true where the party is compelled to prove his case from the mouth of the opposite party. In a similar case, *Chandler v. Town of Attica* (22 Fed. Rep., 625), Judge Wallace held, in passing upon a similar issue, that the court was "at liberty to disregard the testimony of the parties, so as it is incredible, and to interpret the transaction in a way consistent

with the ordinary conduct and motives of business men." If the story of the witness be consistent in itself, the party calling him is to a certain extent bound by his testimony, but if his recital of facts is inconsistent with his theory, the court is at liberty to draw its own inference from them.

Other cases asserting the right to cross-examine an unfriendly witness and to urge the incredibility of his testimony are:

United States v. Budd (144 U. S., 154 *supra*).

Becker v. Koch (104 N. W., 394).

Cross v. Cross (108 N. W., 628).

Arms v. Arms (113 N. W., 646).

Webber v. Jackson (79 Mich., 175).

Emerson v. Wark (185 Mass., 429).

Garny v. Katz (89 Wis.).

1 Starkie on Evidence. 284.

If one of these entrymen, being called as a witness for the Government, had sworn that he was a thousand years old, it may be conceded, *pro argumento*, that the Government would not be allowed to prove his real age. But no court would feel itself bound to accept such a statement, or to render a decree accordingly, upon the assumed theory that the complainant had vouched for the veracity of the witness. Granting all imaginable estoppels against the Government in this cause, the court, at least, is free to believe or disbelieve what the Government witnesses say.

In view of what has been said, showing the conceded hostility of the Government witnesses to the Government, their bias in favor of the defendants, which is disclosed throughout the cross-examination, the Government was frequently surprised in its direct examination, it is clear that counsel for complainant were entitled to cross-examine the witnesses called by them.

United States v. Budd (144 U. S., 154, *supra*).

Clark v. Saffery (Ryan & Moody, 126).

In proving what a man did, it is competent to show what he said when he was doing what is intended to be proven, although what he said may be immaterial to the fact done, or even though his declaration may be incompetent to prove the facts declared.

It being necessary to show that final proofs were made, the Government was obliged to show the fact by the exhibition of the proof papers, and this involved the production of the papers in their entirety. It was not competent in this instance, any more than in any other, to suppress supposedly immaterial portions of the paper, or to mutilate the documents for the sake of eliminating evidence presumed to be objectionable. Whether in any given instance particular statements are material to the present issues, or whether any certain matter is competent to prove some fact extrinsic to the proof, are questions for other considerations. The papers as a whole are necessary to establish the fact that the proofs were made, without regard to the intrinsic

competency or materiality or particular statements, and without regard to the proof of the papers in detail or as a whole.

Assuming, then, that some or all of the statements contained in the final proof papers are, taken independently, not proper matters of evidence, the papers must stand as competent to establish a fact material in the cause, and for that purpose the papers must stand in their integrity. If it should be proposed to refer to these papers for the sake of thereby ascertaining some fact other than the making of proof, the availability of any particular statement for any particular purpose is a question to be determined upon considerations applicable to the particular question.

In relating the transactions which are the subject of this litigation frequent mention has been made of statements made by entrymen in their final proof papers, and occasionally a fact is stated as shown by some entrymen's sworn declaration made in the course of his final proof. If in any or all of such instances the statements quoted are immaterial, or the facts stated are not properly proved by the quotations made, the statements and facts are, of course, not to be considered in tracing the history of the transactions.

The narrative itself, it is believed, will in every instance show its own justification for the use made of the final proof. In all cases where the entrymen were examined, their proof papers were shown to them and were identified by them as their sworn dec-

larations made by themselves in the course of the entries. In these and all other cases the proof papers, being documents required by law to be prepared and filed, and having become a part of the official record, are evidence of the fact that the statements contained in the papers were made in the prosecution of the claim. The competency of such evidence to prove that the statements were made is as clear as the competency of any other records to prove their own contents. In any situation, therefore, where it is material to know what one of these entrymen said on final proof, the papers are competent evidence. In any case where it is material to ascertain the fact to which testimony was given at final proof, the entryman's sworn statement as to that fact made contemporaneously, or nearly so, with the fact itself, is manifestly evidence, of more or less persuasiveness according to the declarant's veracity, and the account heretofore given of the transactions in suit shows in repeated instances how the narrative is made clear, and how incidents otherwise obscured are eliminated, by reference to the statements of entrymen in final proof. The use of the final proof is requisite to an intelligible statement and complete understanding of what the defendants did; and the motion was evidently urged, not because the aid thus afforded to the narrative is immaterial, but because of its peculiar and especially detrimental materiality.

The materiality which inspires this objection lies in the fact that many of the entrymen swore falsely

as to the various matters in their final proof. Such falsehood relates not only to the fact that they had, before making proof, sold or bargained to sell their lands, but to other matters as well, such as the manner in which they had obtained money to pay for the land, how long they had had their money, the extent and sources of their current income, and similar things, all bearing more or less directly upon the good faith of the proceeding.

If this falsehood in the final proofs is really immaterial, then it does not at all concern the defendants. If the fact that the entrymen, through whom the defendants claim, were guilty of fraud in obtaining their titles has any possible tendency to prove fraudulent purpose or fraudulent practice on the part of the defendants, then that falsehood is highly material.

Some surprise would be caused by the proposition that the purchaser of a fraudulently acquired title could not be, in any case, affected by the known fraud of his vendor in acquiring the title. If these entries were made in fraud of the law, and the defendants bought, knowing that fact, counsel will not suggest that the fraud did not vitiate their titles. If the fact be that the defendants themselves, intending a fraud upon the law, caused the entries to be made in falsehood, it is preposterous to say that the fact of falsehood can not be shown. Nor will it be even argued that falsehood on the part of the entrymen does not tend to prove fraudulent purpose on the part of those who procured the entries to be made,

and, in any view of the case, the fact that the entrymen secured their titles by fraudulent means would at least create a presumption of fraud against the defendants which it would be incumbent upon the latter to rebut. In this instance the defendants have felt themselves obliged to offer copious testimony to establish their own innocence—an undertaking which would have been wholly unnecessary unless the very proof now pronounced immaterial had warranted inferences against the defendants which they were advised must be defeated.

One of the material averments of bill is to the effect that the defendants conspired to obtain titles from the United States by fraud, falsehood, deceit, and imposition upon the land officers and that the titles were actually obtained by such means.

The obviously proper method to prove this averment is to produce the final proofs and to show that they contain falsehoods. If the proofs can not be used for this purpose, the fact alleged is impossible of proof. To say that the falsehoods embodied in the final proofs are immaterial is to say that no such averment can ever be proved, and that every fraud upon the United States affected by means of false proof is necessarily unsusceptible of correction.

Counsel, being of course indisposed to go the length of this absurdity, will limit their objection to that particular falsehood in the final proofs whereby the entrymen denied that they had previously sold or agreed to sell the lands, that being the particular fraud which was held in the Williamson decision to

be immaterial in that particular case. But this is not an objection to the final proof as a whole, but only to a single and comparatively unimportant statement embedded in a mass of other statements, all equally false. At any rate, the objection would be available only as against the particular unauthorized statement, if anyone think it worth while to descend into such particularity in such a mass of falsehood.

Williamson v. United States (207 U. S., 424) was an indictment for conspiracy to commit subornation of perjury. In that case it was held that a given paper did not prove perjury in another paper. That is a very different thing from saying that the same paper may not in another case and upon a different issue tend to prove something else.

To say that false swearing, when proof of swearing is not required by law, does not constitute perjury falls far short of saying that the same false swearing may not amount to deceit and constitute a fraudulent means of effecting a fraudulent purpose. So far as the present bill proceeds upon averments of perjury in the final proofs, if there are such averments in the bill, it may be conceded that the false statements at final proof as to alienation do not tend to prove those averments, and that is as far as the *Williamson* case can touch the present cause. But so far as the bill alleges fraud, fraudulent purpose, the use of fraudulent means, misrepresentations, imposition upon the land officers, and the obtaining of titles by falsehood, deception, deceit, and fraud, which facts are the gravamen of the bill, the false swear-

ing at final proof is plainly competent to prove such averments, and is palpably material to the issue presented.

THE FINAL PROOFS.

The admission of final proofs was objected to on the ground that they were incompetent, irrelevant, and immaterial.

The objection to the final proof papers, which is obviously in the mind of moving counsel, is the ruling in the Williamson case, *supra*, to the effect, as assumed, that the admission of such papers is erroneous. Conceding, for immediate purposes of argument, that this is a correct understanding of the proceeding referred to, it will be observed that the language of the decision relates, not to final proof generally, or even to the competency of final proof in that particular case, but to certain affidavits offered as a part of the final proof in that case, but which the court held were not properly required as final proof. The matter held objectionable was not the statutory final proof, but matter which in the decision itself is adjudicated not to be final proof at all. If, therefore, the authority of the Williamson case is relied upon to support this branch of the motion, the motion must be limited to any portion of the papers here put in evidence as final proof, which portion is no more than the affidavit which in that case was held incompetent to prove the issue in that case. Beyond these affidavits the Williamson decision does not go, even for the purposes of the precise question before the court.

The statements held in the Williamson case to be beyond the power of the General Land Office to require at proof related to the applicant's alienation of the land intermediate his application and his proof. In the entries involved in the present case statements as to this fact were taken by the local officers as part of the final proof, and in connection with the claimant's testimony concerning other matters which also were part of the final proof. The statute required final proof to be made, and prescribes that it shall cover certain designated matters, of which the alienation of the land before the date of proof is not one.

It is respectfully submitted that the decrees of the District Court should be reversed and that the cause be remanded to that court with instructions to enter decrees to the effect that the patents issued to the several entrymen named in the three bills of complaint as amended, with the exception of those issued which we have herein conceded the evidence does not justify a cancellation of the patents, be avoided and canceled.

PEYTON GORDON,

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